

1 STATE OF INDIANA)
) SS:
2 COUNTY OF DELAWARE)
3
 IN THE DELAWARE COUNTY SUPERIOR COURT
4
5 CRAIG DUNN and PHILIP WILEY,)
 et al.,)
6 Plaintiffs,)
)
7 -v-) CAUSE NO.
) 18D01-9305-CT-06
8 RJR NABISCO HOLDINGS)
 CORPORATIONS, et al.,)
9 Defendants.)

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11 VOLUME 16
 MARCH 3, 1998
12
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14
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MR. CASSELL: All rise.

THE COURT: Be seated. Morning,
ladies and gentlemen.

ALL: Morning.

THE COURT: Jury appears in its
entirety, together with all three
alternates. Morning, Counsel.

ALL: Morning.

THE COURT: I understand the next
matter perhaps is a video deposition of
Huber; is that correct?

MR. PATRICK: Yes, Your Honor.
It's another video. We'd offer the
deposition transcript of the deposition of
Dr. Gary Huber against the following
defendants: RJ Reynolds Tobacco Company,
Brown & Williamson Tobacco Corporation,
Philip Morris, Incorporated; the Liggett
Group, Incorporated; and Lorillard Tobacco
Company.

THE COURT: All right. Thank you,
Counselor.

Ladies and gentlemen, this is offered
only as to those named defendants. The
Court's previously ruled on the

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admissibility of this, and ruled on any
objections there may have been.

All right. You may publish, Counselor.

MR. PATRICK: Thank you.

(Video shown)

Q Dr. Huber, my name is Ron Motley. We have
met on several occasions. How are you this
afternoon, sir?

A Just fine. Thank you, sir.

10 Q Dr. Huber, you received a subpoena to appear
11 in this courtroom earlier this month;
12 correct?
13 A Correct.
14 Q And state your name, please, for the record?
15 A Gary Lewis Huber.
16 Q Where do you live, sir?
17 A [DELETED]
18 Q Are you married?
19 A Yes, sir.
20 Q And have children?
21 A Yes.
22 Q In fact, your daughter is a lawyer?
23 A She works for a law firm.
24 Q Okay. And where are you employed currently,
25 sir?

5471

1 A I'm employed by the Texas Nutrition
2 Institute. I also am paid by East Texas
3 Medical Center and the University of Texas.
4 THE COURT: You're going to have to
5 turn that up a little.
6 Q You are a medical doctor?
7 A Yes.
8 Q Would you tell us where you went to medical
9 school, sir?
10 A I went to the University of Washington.
11 Q When did you graduate?
12 A I graduated in 1966.
13 Q And you have received a subspecialty in
14 pulmonary or lung disease?
15 A That's true.
16 Q And when did you develop your interest in
17 respiratory disease?
18 A In medical school.
19 Q How long did you actively practiced clinical
20 medicine or research medicine?
21 A 30, 35 years.
22 Q Dr. Huber, did you come, at a point in time
23 in your career, to become involved in a
24 program at Harvard Medical School studying
25 cigarette smoke and its effect on human

5472

1 health, beginning in the early 1970s?
2 A Yes.
3 Q And that was again where?
4 A At Harvard Medical School.
5 Q Did you receive funding from any cigarette
6 companies?
7 A Harvard University received funding, yes.
8 Q And they did receive funding from cigarette
9 companies?
10 A Yes.
11 Q Okay. Did you approach the cigarette
12 companies or did they approach you about
13 being involved in research?
14 A They approached me.
15 Q And can you describe for us how that
16 occurred?
17 A I was approached at a chess meeting, an
18 Aspen chess conference in Colorado, to
19 inquire whether we had an interest in
20 studying tobacco and health.

21 Q And approximately what year would that have
22 been, sir?
23 A 1971 or '72.
24 Q And what type of research did you undertake
25 that was funded in part by cigarette

5473

1 companies?
2 A We undertook a comprehensive program in
3 tobacco and health, and smoking and health
4 research that involves both experiment on
5 animals and human studies, that was, for its
6 time, a very advanced scientific and
7 technical study.

8 Q How long did you conduct the study that was
9 paid in part by cigarette companies at
10 Harvard?

11 A Eight years.

12 Q From 1972 to 1980?

13 A Yes.

14 Q Did you publish any results of your studies?

15 A Yes.

16 Q Would you describe for us, sir, with respect
17 to the animals what, if anything, you were
18 able to produce in the way of disease?

19 A There were an extensive number of studies.
20 Our primary objective was to study the
21 response of the lung to inhaled tobacco
22 smoke, under experimental conditions, in
23 laboratory animals. We had animal models
24 looking at airways of the lung, the lung
25 parenchyma, the heart, cardiovascular

5474

1 system, relative to those diseases that had
2 been linked to smoking in epidemiologic
3 studies: COPD, emphysema, chronic
4 bronchitis, coronary artery disease, and
5 related diseases.

6 Q What was your purpose in studying whether
7 these animals developed lung disease from
8 breathing in smoke, cigarette smoke?

9 A There were several purposes. One was to
10 evaluate whether or not animals could, in
11 fact, breathe in cigarette smoke; two, to
12 define their response of the animals to
13 smoke if they inhaled it; and three, to see
14 if they developed any responses that were
15 comparable to the responses that had been
16 attributed to smoking in humans.

17 Q Dr. Huber, were you proud of this work?

18 A Yes, sir, very much.

19 Q And did you advise the cigarette companies'
20 sponsors at any time of your research
21 results?

22 A Yes.

23 Q And did you advise them that you had or had
24 not demonstrated human-type lesion or
25 changes in the lung caused by inhaling

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1 cigarette smoke?

2 A Yes, we did.

3 Q And what specifically did you advise them
4 when you got final conclusive results?

5 A Well, to the degree that our results were

6 final and conclusive, we advised them of
7 those results, that we felt we had defined
8 in many ways a response to animal systems to
9 tobacco smoke, that we had some analogous
10 pathologic changes that we felt were
11 comparable to those seen in humans, and that
12 we had mechanisms to, in part, explain those
13 changes, and that we had diseases that were
14 related to smoking associated with diseases
15 in humans.

16 Q In other words, Doctor, what results did you
17 communicate to the cigarette company
18 sponsors of your animal research where the
19 animals were breathing cigarette smoke?

20 A We had an effective way to expose animals in
21 such a way that they inhaled the tobacco
22 smoke, and other forms of smoke. That there
23 was a defined response to that inhalation,
24 and that we had what we considered
25 mechanisms of that response that might be

5476

1 associated to disease production, and that
2 we had models of human disease that needed
3 to be pursued.

4 Q Now, you also mentioned that you studied
5 humans. Would you describe that particular
6 study that was funded in part by the
7 cigarette companies?

8 A We had several studies in humans, evaluating
9 the acute effects of smoking tobacco
10 cigarettes of varying type and delivery of
11 constituents on the cardiovascular system,
12 on their pulmonary system, and on the way in
13 which they smoked cigarettes.

14 Q Did you study the effect of nicotine?

15 A Yes.

16 Q Did you report any results of that study to
17 cigarette company sponsors?

18 A Yes.

19 Q What results did you report?

20 A We reported that in the initial studies,
21 that our technologies indicated that people
22 smoked differently, depending upon nicotine
23 delivery. And that if nicotine delivery was
24 altered, people could titrate or accommodate
25 their smoking behavior to the changes in

5477

1 nicotine.

2 Q What was the significance, if any, of that
3 finding, sir?

4 A That if nicotine were lowered, individuals
5 took deeper inhalation breaths, larger puff
6 volumes, held their breath and smoked in a
7 different way, which potentially was
8 adverse.

9 Q Adverse in what way?

10 A Adverse to the response of the lung to
11 pulmonary disease -- to the development of
12 pulmonary diseases.

13 Q In that fashion, by regulating their intake
14 of smoke, Doctor, were they then
15 contributing to ultimate injuries to
16 themselves, those smokers?

17 A That was our hypothesis that we were
18 pursuing.
19 Q And what result did you achieve?
20 A We felt they retained more smoke and
21 probably deposited it in a different way and
22 potentially adverse way, if nicotine were
23 lowered.
24 Q Now, did you publish your findings about
25 nicotine compensation?

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1 A Some, yes. Or we presented them --
2 presented and/or published them.
3 Q Were you free to publish?
4 A Yes.
5 Q Did you publish, in any fashion, to
6 scientists your findings about the rats and
7 emphysema?
8 A Yes.
9 Q Where?
10 A It was in a journal, and I would have to
11 have a citation to be able to cite it
12 exactly.
13 Q Was it a foreign journal?
14 A Yes.
15 Q Did you personally also present these
16 emphysema findings to a group of scientists
17 in an audience?
18 A Yes, on several different occasions.
19 Q Did you present your emphysema findings to
20 lawyers who represented cigarette companies?
21 A Yes.
22 Q Did you present your findings to scientists
23 who represented cigarette companies?
24 A Yes.
25 Q Did you report to the companies who

5479

1 sponsored the research, in writing, your
2 findings of cigarette smoking inducing
3 emphysema in rats?
4 A Yes.
5 Q When?
6 A I'd have to see my correspondence to be
7 sure. I would guess 1979 or 1980.
8 I have 2.
9 Q You should have one of the Lorillard, the
10 Brown & Williamson and the Reynolds.
11 A I do not have one of the Reynolds.
12 Q Dr. Huber, would you confirm for us that
13 that, or those are letters that you
14 communicated to officials of Brown &
15 Williamson, RJ Reynolds and Lorillard?
16 A Yes.
17 Q And did you -- do you recall whether you
18 made similar communications to Philip
19 Morris?
20 A Yes.
21 MR. MOTLEY: Would you mark those,
22 please, as 1, 2, and 3?
23 Q Dr. Huber, were your findings regarding --
24 some of your findings regarding the nicotine
25 titration or compensation reported to
1 scientific peers of yours?

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2 A Yes.
3 Q And was it also reported in the newspaper
4 article, in the Boston Globe?
5 A Probably.
6 Q Now, I want to ask you before I go into
7 detail into these studies, Doctor, questions
8 about whether or not lawyers were involved
9 during your period of research at Harvard
10 University, lawyers for cigarette companies.
11 And my first question to you, sir, is, when
12 you were initially contacted by officials of
13 cigarette companies to do this research at
14 Harvard, was this contact made by a
15 scientist, business executive or a lawyer?
16 A None of the above. It was made by
17 Dr. Gilbert Huebner.
18 Q How do you spell that, sir, H-U-E-B-N-E-R?
19 A Probably.
20 Q And who was he with, sir?
21 A He was with the Tobacco Institute.
22 Q Okay. And he was the initial contact?
23 A Yes.
24 Q What did you understand that your research
25 was to do when you were contacted by the
5481
1 Tobacco Institute's Dr. Huebner?
2 A Well, at that time they were studying air
3 pollutants and the adaptation of the lung to
4 air pollutants on recurrent exposures, and
5 described the phenomenon called "oxidant
6 tolerance," where the lung became tolerant
7 to the otherwise toxic effect of air
8 pollutants.
9 Q After this initial contact by Dr. Huebner,
10 did you subsequently come in contact with
11 any lawyers who represented cigarette
12 companies?
13 A Eventually.
14 Q Can you -- do you have a recollection of how
15 that came about?
16 A I think the first contact with lawyers
17 occurred in Washington, D.C. And I don't
18 remember the date. But I was invited to
19 come there at the Tobacco Institute to
20 discuss potential research funding on a
21 research project at Harvard with Dr.
22 Huebner. And I think it was at that time I
23 first met lawyers.
24 Q Prior to that time, sir, had you had lawyers
25 involved in the scientific research you were
5482
1 conducting?
2 A Well, I'd have to review our records for
3 sure. But I don't recall right now.
4 Q You don't recall lawyers being involved with
5 research in the past, at least your own
6 research?
7 A Not right off the top of my mind, no.
8 Q Now, was your research done at Harvard,
9 though paid for by the cigarette companies,
10 was it a policy of full and open disclosure;
11 that is, were you free to publish your
12 findings?

13 A Yes, we had what we call an open-door
14 policy: people could, at any time, see what
15 research we were doing, and we were free to
16 pursue any direction or publish any results.
17 Q While they're looking for this document,
18 Dr. Huber, thereafter, after that initial
19 meeting with Mr. Hardy, were cigarette
20 company lawyers regularly contacting you
21 about your research that you were doing at
22 the expense of the cigarette companies?
23 A I think it was an ongoing and regular
24 process throughout the entire program, yes.
25 Q That the lawyers were involved with you?

5483

1 A Always.
2 Q Did Mr. Hardy have a science degree, that
3 is, did you call him Dr. Hardy, or anything
4 like that?
5 A No.
6 Q Did he have a science degree?
7 A I don't know, sir.
8 Q He never said he did?
9 A No.
10 Q Who were some of the other lawyers you were
11 involved with who represented cigarette
12 companies?
13 A Mr. Shinn from Shook Hardy.
14 Q From the same law firm as Mr. Hardy?
15 A (Affirmative nod). Later on Mr. Hardy's
16 son, David K. Hardy, Lee Stanford, Tony
17 Andrade, other lawyers from other law firms.
18 Q Does the name Ed Jacobs ring a bell?
19 A Yes.
20 Q Was he involved also?
21 A Yes.
22 Q Dr. Huber, I'm marking in the record
23 something -- as soon as counsel has a chance
24 to look at it.

25 Dr. Huber, I will ask you if you can

5484

1 identify what will be marked as Exhibit 4.
2 A I was just looking for a date, which I can't
3 find. But, yes, I've read this.
4 Q And can you tell us what it is, sir?
5 A It's the -- it's the agreement between
6 Harvard University and representatives of
7 the tobacco industry to undertake and
8 initiate the Harvard Research Tobacco and
9 Health Program.
10 Q And that was what you were in charge of?
11 A Yes, sir.
12 Q And, Dr. Huber, on the first page of this
13 proposal that was signed by various persons
14 from Harvard and, also, signed by Ed Finch
15 of Brown & Williamson, someone Harrington of
16 Liggett & Myers, Mr. Judge of Lorillard, a
17 name I cannot read, two names I cannot read
18 on behalf of Reynolds and Philip Morris,
19 another name I can't read on behalf of Larus
20 & Brother Company, and what looks like
21 Mr. Tolley, I can't read this name either.
22 They share common inability to write their
23 names down so that I can read it. Are these

24 names familiar to you, sir?
 25 A May I see that again? 5485

1 Q Sure.
 2 A Yes.
 3 Q You recognize those names, sir?
 4 A Yes, but I can't read them either.
 5 Q And, Doctor, according to that agreement
 6 with Harvard, with respect to your research,
 7 were you, as set forth on the first page,
 8 free to publish your findings?
 9 A Yes.
 10 Q You were? And you did, in fact, publish
 11 many of your findings?
 12 A Yes, sir.
 13 Q I want to ask you, sir, during your
 14 eight-year experience at Harvard doing
 15 research funded in part by the cigarette
 16 companies, would you state, on the record,
 17 your observations with respect to whether or
 18 not lawyers closely controlled medical
 19 research being sponsored by cigarette
 20 companies.
 21 Can you answer that, sir?
 22 A Yes and no.
 23 Q Okay. Tell me what "yes" means and then
 24 tell me what "no" means.
 25 A I think there were lawyers with differing 5486

1 opinions and different positions that were
 2 associated with the industry.
 3 Q Well, did some lawyers associated with the
 4 industry attempt to exercise close control
 5 over the research that you were doing in
 6 Harvard?
 7 A Yes.
 8 Q Which ones?
 9 A Oh, I think lawyers from Shook Hardy
 10 exerted -- they were our liaison to the
 11 industry, and at times they clearly
 12 controlled our access to the industry and
 13 our requests for industry help.
 14 Q Sir, did you also communicate with any
 15 scientists within the cigarette companies
 16 themselves?
 17 A Yes, many.
 18 Q Does the name Alex Spears mean anything to
 19 you?
 20 A Yes.
 21 Q And who is he, sir?
 22 A He was the -- I don't know for sure exactly
 23 what his title was, but he was the director,
 24 I think, of research at Lorillard in
 25 Greensboro. 5487

1 Q Lorillard Company?
 2 A Yes.
 3 Q And you communicated with him?
 4 A Oh, yes.
 5 Q What about Alan Rodgman?
 6 A Yes.
 7 Q Who was he with?
 8 A He was with RJ Reynolds.

9 Q Thomas Osdene?
 10 A Yes.
 11 Q Who was he with?
 12 A Philip Morris.
 13 Q Do you remember the names of any scientists
 14 at Brown & Williamson during the Harvard
 15 years?
 16 A There were several and I -- to be accurate,
 17 I would have to look at the records. Wally
 18 Hughes, I think, was a scientist, I think
 19 that's his name; and several others.
 20 Q Dr. Huber, when Mr. Hardy first met you and
 21 introduced himself, did he express any
 22 feelings or emotions about the Harvard
 23 program having been started or commissioned
 24 prior to his meeting you?
 25 I meant Hardy, Sr., at this time, sir.
 5488
 1 A Yes.
 2 Q And thereafter did he involve himself
 3 actively in monitoring your research?
 4 A Yes.
 5 Q Were you doing this research for the
 6 cigarette companies in order for --
 7 A I was doing this research --
 8 Q Yes, sir.
 9 A -- for us not for the cigarette companies.
 10 Q Did you understand that the cigarette -- you
 11 had been hired to prepare research for
 12 lawsuits?
 13 A No.
 14 Q Did Mr. Hardy ever tell you that the only
 15 reason they were giving money to Harvard for
 16 you to research rats and humans so they
 17 could use the results in a lawsuit?
 18 A No.
 19 Q Dr. Huber, Exhibit 6 is what?
 20 A This was a probably -- I'm missing page 1.
 21 Q With the understanding that page 1 is not
 22 there, Dr. Huber, what is that?
 23 A This is a draft of our paper that was
 24 submitted and, I think, it's now published.
 25 I don't know if this is -- this may be the
 5489
 1 final version.
 2 Q Doctor, did I understand you to say that a
 3 version of this paper either has been
 4 published or shortly will be published?
 5 A I think it's published. But I received a
 6 copy of the final published form which was
 7 slightly edited to avoid redundancy of other
 8 papers and to take out a couple of phrases
 9 that I wish would have been left in. But I
 10 think that that was as we wrote it.
 11 Q Exhibit 6, as you wrote it, sir, do you make
 12 this statement that there was an effort at
 13 suppression and disinformation by the
 14 cigarette companies and their lawyers with
 15 respect to smoking and health matters?
 16 A Yes.
 17 Q What do you base that on, sir?
 18 A I base that on reading the literature and
 19 published articles, and reflecting on some

20 of our correspondence.
21 Q Have I, Ron Motley, representing the State
22 of Texas, also shared with you industry
23 documents which you had not previously seen?
24 A Yes.
25 Q Do those documents, which I will go into in

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1 some detail, from RJ Reynolds support or
2 detract from your statement in that Book
3 Chapter, that the cigarette companies and
4 their lawyers were engaged in cover-up and
5 suppression of scientific information?
6 MR. VOICE: Objection, Your Honor,
7 privileged. And even though I don't know
8 the date of this exhibit, I note within
9 the -- on page 3 it says, "In 1992, and
10 continuing to the present." Which indicates

11 to me that Dr.

12 was clearly within his

12 contractual arrangements with Shook, Hardy &
13 Bacon and Jones, Day, Reavis & Pogue as our
14 consultant expert; and anything that he
15 would have to say about this would be
16 privileged and confidential.
17 Q I notice you shake being your head when
18 counsel was making that objection. Was that
19 statement he made in the record accurate,
20 according to your observation of events?
21 A I don't think so.
22 Q Okay. Now, you wrote that chapter, that's
23 going to be published in open literature for
24 anyone to read; correct?
25 A I think it is published already.

5491

1 Q But anyone can buy it, not just lawyers?
2 A Right.
3 Q Okay. And --
4 A Dr. Pandina and I wrote this Chapter.
5 Q And who is he?
6 A He's the Director for the Center of Alcohol
7 Studies at Rutgers University. We've been
8 collaborators since the days from Boston.
9 Q And, Dr. Huber, when did you first meet me,
10 Ron Motley, representing the State of Texas?
11 Approximately, you don't have to provide the
12 exact date.
13 A Sometime, I would guess, in July.
14 Q And, Dr. Huber --
15 A Of this year.
16 Q Was that document that's Exhibit 6 written
17 in that form before you met me?
18 A Yes.
19 Q How long have you been working on that
20 chapter, sir?
21 A Well, it was written in a very short time
22 frame. Late in the spring and early summer.
23 Q Did the law firm of Jones Day, or Shook
24 Hardy, or both, pay you to write that
25 Chapter, in which you claim that lawyers and

5492

1 cigarette companies conducted themselves in
2 an effect -- having an effect of suppression
3 of scientific information?

4 A No.
5 Q They did not. Is that your view today, sir,
6 that the lawyers of the cigarette companies
7 effectuated suppression of scientific
8 information and conducted a disinformation
9 campaign?
10 A Yes. Yes.
11 Q Your answer is "yes"?
12 A Yes.
13 Q Now, Doctor, I want to ask you --
14 A Some lawyers.
15 Q Some lawyers.
16 A Yes.
17 Q Okay. Not all of them. Okay.
18 Dr. Huber, in addition to writing the
19 letters that we just showed you a few
20 moments ago to Brown & Williamson, RJ
21 Reynolds and Lorillard, did you make any
22 personal presentations, of the information
23 about rats getting emphysema from cigarette
24 smoke, personally to any officials of
25 cigarette companies?

5493

1 A I think -- I mean, there's an extensiv 6 Q
Did the bottom result of this research
7 demonstrate that smokers were titrating or
8 compensating when they switched to lower tar
9 and nicotine cigarettes?
10 A Some did and some did not.
11 Q And did you report those findings, sir?
12 A Yes.
13 Q Did you report them to cigarette company
14 officials?
15 A Yes.
16 Q Did you report them to scientists?
17 A Yes.
18 Q And, in fact, was there a newspaper article
19 about your finding? I'll show you
20 (indicating).
21 Do you recall that newspaper article,
22 Dr. Huber?
23 A Yes. I haven't read it for years, but I
24 recall it.
25 Q And, in fact, as a result of that newspaper
5508
1 article, you wrote a letter to Dr. Waite at
2 the Tobacco Institute, do you recall that?
3 A No.
4 Q Do you recall -- oh, you hadn't seen it yet.
5 I'm sorry.
6 A Does the letter have a date on it? I mean,
7 I recall the letter; but I don't remember, I
8 don't see a date.
9 Q Well, Dr. Huber, in 1980 were you still at
10 Harvard?
11 A Yes.
12 Q Okay. And does that letter make reference
13 to a newspaper article in the Boston Globe
14 by Richard Knox?
15 A Yes. But I think it's a different article
16 than this one. There's another article by
17 Richard Knox when the emphysema studies were
18 first presented.

19 Q Okay. Well, in this letter to Dr. Waite,
20 whenever it was written, do you make
21 reference to what you testified to here
22 earlier; that is, that infection did not
23 adversely influence the results of your rat
24 studies?
25 A Yes.

5509

1 Q Now, would you look at the newspaper article
2 I previously gave you, please.

3 A This one?

4 Q Yes, sir. That's No. 7.

5 The reporter reports that a Harvard
6 study has found "That smokers unconsciously
7 alter their smoking behavior when given high
8 tar and low tar cigarettes without knowing
9 which was which. Most smokers in this study
10 consistently held the smoke from the low tar
11 cigarettes in their lungs a longer time in
12 an apparent effort to extract more
13 satisfaction from them."

14 Did you report findings similar to that
15 reported in this newspaper?

16 A On several different occasions, yes.

17 Q "The results reported last week at a meeting
18 in San Francisco by the American Federation
19 for Clinical Research, constitutes some of
20 the first evidence undermining the tobacco
21 industry's recent advertising that implies
22 low tar and ultra low tars may be safer."

23 Did you report your findings about
24 nicotine compensation, in San Francisco, at
25 a meeting as described in this newspaper

5510

1 article?

2 A Yes, we did.

3 Q And do you see in the next paragraph it
4 makes reference to a six-year-old, \$1
5 million-a-year project funded by the
6 National Institute of Health and a group of
7 seven tobacco companies, directed by Gary
8 Huber?

9 A Yes.

10 Q And is that you, sir?

11 A Yes, sir.

12 Q Down at the bottom of the first column it
13 states that, "The medical director of the
14 Tobacco Institute," whose name is stated in
15 the second column as being Dr. Charles
16 Waite, "said that the Boston research group
17 appears to confirm other studies which
18 indicate that people smoke for nicotine and
19 that they self-regulate their own dose
20 level. But, he added, 'So what?'"

21 Did I read that correctly?

22 A Yes.

23 Q And did you recall reading the statement of
24 the medical director of the Tobacco
25 Institute at or about the time this article

5511

1 came out?

2 A Yes.

3 Q Let me ask you a question, sir: Can your

4 research on nicotine titration and smokers
5 keeping smoke deeper in their lungs and for
6 longer periods of time, be characterized
7 scientifically as -- or be dismissed
8 scientifically as a "so what" finding?
9 A I hope not.
10 Q Why not, sir?
11 A Well, I think it might have significant
12 health implications.
13 Q Health to humans?
14 A Yes.
15 Q This was a study of humans?
16 A Yes.
17 Q Do you see further that Dr. Waite is
18 reported as saying, "People who worship at
19 the temple of health and those who think
20 that by intervening in their own lifestyle
21 they're going to live longer may believe
22 that, but I don't think there's any
23 assurance from the companies that the lower
24 tar and nicotine cigarettes are any safer."
25 Now, sir, you recall reading that

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1 statement at the time?
2 A I read this when it came out, yes.
3 Q From your own study?
4 A Yes.
5 Q When you privately reported your nicotine
6 titration findings to cigarette company
7 officials -- you did do that, did you not?
8 A Yes.
9 Q Did anybody dismiss it as people worshipping
10 at the temple of health or say "so what" to
11 you, to your face?
12 A No.
13 Q Sir, did your human research tend to
14 indicate that smokers were smoking more
15 intensely to obtain in their bodies the same
16 amount of nicotine?
17 A Most.
18 Q Most were --
19 A Right.
20 Q -- correct?
21 What were the implications of your work
22 at Harvard on human subjects with nicotine,
23 with respect to such issues as whether or
24 not nicotine may be a dependence-producing
25 substance or an addictive substance?

5513

1 A It would support -- it would support the
2 concept that it was a dependence-producing
3 substance.
4 Q Did you tell officials of the cigarette
5 companies that, the implications of what you
6 proved?
7 A We presented it to them in great detail.
8 Q And was your funding renewed to continue
9 that study?
10 A No.
11 Q Doctor, with respect to your study of
12 nicotine titration or compensation, did your
13 results provide any insight into the
14 question of whether low tar, low nicotine

15 cigarettes were healthier or safer than high
16 tar cigarettes like Marlboro?
17 A It raised, I think, extremely important
18 questions and issues that we never got a
19 chance to answer.
20 Q What issues did it raise that you find of
21 importance to public health?
22 A That if people smoked for nicotine, then
23 lower nicotine delivery may make it a more
24 harmful product.
25 Q If smokers inhale more deeply to compensate
5514
1 for lower nicotine, would this tend to
2 spread smoke into the periphery of the lung?
3 A Yes.
4 Q And did you report that to cigarette company
5 officials?
6 A We had -- we had data on that that we showed
7 to them.
8 Q To the cigarette company executives?
9 A Yes.
10 Q And this again is part of your research
11 program that you were free to publish at
12 Harvard?
13 A Yes.
14 Q It was not incident to a lawsuit that you
15 were doing this nicotine nitration study,
16 was it?
17 A No.
18 Q Are you familiar, as a lung doctor, with a
19 form of lung cancer called adenocarcinoma?
20 A Yes.
21 Q Where does that occur in human lungs, sir?
22 A It occurs more peripherally.
23 Q Sir -- I'm sorry.
24 A Or distally.
25 Q Out in the outer regions of the lung; is
5515
1 that correct?
2 A Yes.
3 Q To your personal knowledge, as a practicing
4 lung specialist, is cancer of the periphery
5 of the lung, or adenocarcinoma, on the rise
6 in smokers today?
7 A Yes.
8 Q And what do you base that statement on, sir?
9 Did some lawyer tell you that or did you
10 read that in a scientific journal?
11 A I read it in scientific journals.
12 MR. GARDNER: Judge, Tom Gardner.
13 I would like to move to strike that answer
14 on privilege grounds. Those are the
15 journals he's reading at our request and at
16 our expense.
17 (Video paused)
18 MR. OHLEMEYER: Excuse me, can we
19 approach?
20 MR. MOTLEY: Turn it off for a
21 second.
22 (Bench discussion)
23 MR. MOTLEY: Can I have one second,
24 please?
25 THE COURT: Sure.

1 MR. MOTLEY: Judge, he's going to
2 need a minute to find where we are.

3 THE COURT: All right.

4 MR. PATRICK: I apologize, Your
5 Honor. We're starting back.

6 THE COURT: That's all right.

7 (Video resumed)

8 Q Doctor, did you hear the lawyer's statement
9 that your reading of these medical journals
10 was on the nickel of the cigarette company?

11 A Yes, sir, I heard it.

12 Q Is that true or false?

13 A That's false.

14 Q Okay. And were you doing tobacco research
15 with Harvard, being compensated by the
16 cigarette companies in 1978; correct?

17 A That's correct.

18 Q Is that the study that you've been referring
19 to?

20 A It's one of the studies. They also had much
21 earlier studies that were funded by the
22 industry on nicotine titration.

23 Q Is it true that you were proud of that?

24 A I don't know about pride. Yes, we were
25 pleased to have that rating.

1 Q And, sir, Mr. Shinn reports to the general
2 counsel that this work, referring to your
3 work, if funded, would investigate whether
4 cigarettes with a low tar and nicotine yield
5 are less hazardous. Do you see those words?

6 A Yes.

7 Q And did you report the findings after the
8 study was completed, to the same cigarette
9 company officials?

10 A Yes.

11 Q And you did not conclude, did you, that
12 those cigarettes -- low tar, low nicotine
13 cigarettes were less hazardous, did you?

14 A No.

15 Q You concluded they were what?

16 A Well, potentially more hazardous, but it
17 would have required further studies.

18 Q Well, were you told that emphysema was
19 produced or emphysema-like lesions were
20 produced in the animals?

21 A No.

22 Q Were you given the records of the studies
23 that were done at RJ Reynolds in biological
24 testing before you started your research
25 program?

1 A No.

2 Q Would such documents have been helpful as
3 background information for you?

4 A Extraordinarily so.

5 Q Exhibit 12, sir, is March 7, 1969. It's an
6 RJ Reynolds report, sir. It says "Initial
7 Attempts at Exposing Rabbits to Whole
8 Cigarette Smoke." Had you ever seen Exhibit
9 12 prior to today?

10 A No. That's this?

11 Q Yes, sir.
 12 A No.
 13 Q Mr. Roemer nor Dr. Rodgman ever gave you
 14 copies of that report?
 15 A No.
 16 Q Doctor, if Reynolds did research exposing
 17 animals to whole smoke to determine the
 18 effect on the lungs, would the information
 19 contained in those reports -- whether they
 20 were positive or negative -- have helped you
 21 and assisted you in your Harvard rat study?
 22 A Extremely so.
 23 Q And you never saw them?
 24 A No, sir.
 25 Q Doctor, did the lawyers, Mr. Jacobs or any
 5519
 1 of the lawyers for cigarette companies, ever
 2 tell you that they viewed the Harvard
 3 cigarette research project as a public
 4 relations plus?
 5 A No.
 6 Q Did they ever tell you, sir, that the
 7 Harvard project was being used to develop
 8 testimony for court?
 9 A No.
 10 Q Were you ever told, sir, on the occasions
 11 that you met with Dr. Spears, that he viewed
 12 joint industry funded smoking and health
 13 research programs as useful, not against
 14 specific scientific goals but rather for
 15 various purposes such as public relations,
 16 political relations, position for
 17 litigation, et cetera?
 18 A No. Can I -- can you restate the question.
 19 Q Let me read it again. Did Dr. Spears -- who
 20 is not a lawyer to your knowledge, right?
 21 A Right.
 22 Q Ever tell you that he viewed -- "he,"
 23 Dr. Spears viewed joint industry funded
 24 smoking and health research programs, such
 25 as at Harvard -- that's not in any document
 5520
 1 I've given you yet -- were not selected
 2 against specific scientific goals but rather
 3 for various purposes such as public
 4 relations, political relations, position for
 5 litigation, et cetera. In general these
 6 programs have provided some buffer to public
 7 and political attack of the industry as well
 8 as background for litigious strategy?
 9 MR. VOICE: Objection. Privileged.
 10 Q Did Dr. Spears ever tell you that, sir?
 11 A No.
 12 Q Did he ever tell you that in 1974 he was
 13 writing the president of Lorillard,
 14 Mr. Judge, and telling him that the Harvard
 15 project was useful for political relation?
 16 MR. NEWBOLD: Objection.
 17 Privileged.
 18 A No.
 19 Q Doctor, I just handed you a memo of June 24,
 20 1974, from Dr. Spears to Mr. Judge; and I
 21 ask you first, sir, have you ever seen that

22 before?
 23 A I think I have.
 24 Q And who showed it to you?
 25 A You.

5521

1 Q Okay. Prior to my showing it to you
 2 sometime this summer, had you seen it
 3 previously?
 4 A No.
 5 Q Do you see a reference on page 1 to the
 6 Harvard project?
 7 A Yes.
 8 Q Okay. And would you look, sir, on page 3,
 9 the last paragraph, which reads,
 10 "Historically the joint industry funded
 11 smoking and health research programs have
 12 not been selected against specific
 13 scientific goals but rather for various
 14 purposes such as public relations, political
 15 relations, position for litigation, et
 16 cetera."
 17 A Yes.
 18 Q Did I read that correctly?
 19 A Yes.
 20 Q No one at Lorillard ever mentioned that
 21 statement to you from 1972 to 1980, did
 22 they?
 23 MR. NEWBOLD: Objection.
 24 Privileged.
 25 A Not that I can recall.

5522

1 Q Sir, turn to page 4, please, same document.
 2 Do you see in paragraph 3 that Dr. Spears
 3 suggests that the program that Harvard and
 4 Washington University be brought under the
 5 same committee and the scientific director
 6 of CTR. "In addition to providing
 7 instructor for coordination, we believe that
 8 more efficient use of information for public
 9 relations and legislative activities is to
 10 be gained and reductions in administrative
 11 and legal fees can be effected."
 12 Did I read that correctly?
 13 A Yes.
 14 Q Were you ever told that Dr. Spears, with
 15 whom you had -- well, did you have regular
 16 contact with Dr. Spears?
 17 A Yes.
 18 Q Were you ever told that Dr. Spears was
 19 recommending that your program be brought
 20 under the scientific director of the Council
 21 for Tobacco Research?
 22 A No.
 23 Q Were you ever told doing that -- that is,
 24 placing your program under the scientific
 25 director of CTR -- that more efficient use

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1 of information for public relations and
 2 legislative activities could be gained?
 3 A No.
 4 Q Did anyone ever intimate to you, sir, that
 5 any member of the cigarette industry was
 6 funding your studies at Harvard for

7 political gains?
8 MR. VOICE: Objection. Privileged.
9 A Can you repeat that question?
10 Q I'll rephrase it.
11 In the entire eight-year period of time
12 you were doing research at Harvard, did
13 anyone from the cigarette companies ever
14 suggest to you that the Harvard project was
15 being used for political and public
16 relations?
17 A No.
18 Q Doctor, No. 14 purports to be a handwritten
19 memo from the desk of Curtis Judge. Have
20 you met Mr. Judge previously, sir?
21 A Yes.
22 Q In 1975 were you doing research for the --
23 paid in part by the cigarette companies, at
24 Harvard?
25 A Yes.

5524

1 Q Would you turn to page 2. Do you see No. 4.
2 A Yes.
3 Q "No P.R. value ala Harvard."
4 A Yes.
5 Q Were you aware that cigarette companies were
6 creating memos describing the public
7 relations value of your studies at Harvard?
8 A No.
9 THE COURT: This is 15?
10 MR. MOTLEY: Yes, sir.
11 Q Doctor, have you seen Exhibit 15 prior to
12 today?
13 A I'm not sure unless you gave it to me.
14 Q All right, sir.
15 A Yes, I think --
16 Q All right, sir. Let me put it this way:
17 Did you ever see this document before 1997,
18 if you saw it before today at all?
19 A No. No.
20 Q I asked you to assume, sir, that this is a
21 Lorillard document. In fact, it refers to
22 Lorillard's management. Do you see that?
23 A Yes.
24 Q Okay. I want to read to you paragraph 1.
25 "We have again abdicated the scientific

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1 research directional management of the
2 industry to the lawyers with virtually no
3 involvement on the part of the scientific or
4 business management side of the business."
5 Were you aware or were you told by
6 officials of Lorillard in 1978 that they
7 were concerned that scientific research,
8 paid for by the industry, was being directed
9 and managed by lawyers instead of
10 scientists?
11 A I don't think so.
12 Q Doctor, is the -- are the various documents
13 that I have shown you, that refer to lawyers
14 directing and managing science projects,
15 consistent with what you experienced during
16 the period of time before 1986 when you
17 dealt with cigarette companies and their

18 lawyers?
19 A Can you repeat that?
20 Q Yes. Are the various documents that I've
21 shown you here today, that refer to lawyers
22 directing and managing research, are those
23 statements consistent or inconsistent with
24 what you experienced during the period of
25 time 1972 through 1982?

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1 A We thought we were doing research for
2 scientific reasons. There were always
3 lawyers involved.
4 Q Okay.
5 A I don't know if that answers your question.
6 Q That's -- that's fine.
7 Doctor, in 1980, did you leave Harvard?
8 A Yes.
9 Q Where did you go?
10 A To the University of Kentucky.
11 Q Why?
12 A I wanted to finish the research that we
13 started.
14 Q Which research?
15 A On tobacco and health, on nicotine
16 titration, and on emphysema and
17 cardiovascular diseases.
18 Q What position did you accept with the
19 University of Kentucky?
20 A There were several positions, but the
21 primary position was as director of the
22 Tobacco and Health Research Institute.
23 Q What is that or what was that?
24 A It was a physical building and a program,
25 with a board, funded through a dedicated tax

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1 in Kentucky on the sale of cigarettes, to be
2 used for research.
3 Q When did you arrive approximately?
4 A In -- just before school started in the --
5 in the summer of 1980, permanent.
6 Q And did you begin to review the programs
7 that preexisted your arrival?
8 A Yes. I began that before my arrival.
9 Q Did you believe that you were going to be
10 able to continue your Harvard research at
11 the University of Kentucky?
12 A Yes.
13 Q Were you able to?
14 A No.
15 Q Why?
16 A The program --
17 MR. VOICE: Objection.
18 A The program was disrupted.
19 Q Did you work for lawyers at the University
20 of Kentucky, or did you work for the tobacco
21 and health program?
22 A I worked for the University of Kentucky.
23 Q You didn't work for the industry lawyers?
24 A No.
25 Q When you were doing the work for the

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1 University of Kentucky, were you told that
2 you were only there to provide information

3 for lawsuits?
4 A No.
5 Q Did anyone in the cigarette industry suggest
6 you take the job at University of Kentucky?
7 A Yes.
8 Q Who?
9 A Mr. Pepples.
10 Q Mr. Pepples with Brown & Williamson?
11 A Yes.
12 Q Did he say why you should take that job?
13 A It would be an opportunity to continue the
14 program with maximum support.
15 Q And did that opportunity occur?
16 A No.
17 Q When you took over the program at the
18 University of Kentucky, what was its
19 official name?
20 A The Tobacco and Health Research Institute,
21 and it had a related research board and
22 program.
23 Q How was the program being governed when you
24 took over?
25 A There was no director, and it was governed
5529
1 by the board. It was determined by the law
2 that created the tax.
3 Q Did the board make grants of money for
4 scientific research?
5 A Yes.
6 Q Were any cigarette industry officials
7 sitting on that board that made those
8 grants?
9 A Yes.
10 Q Who?
11 A At different times in my limited
12 association, Mr. Pepples and before him,
13 Mr. DeBaun Bryant.
14 Q Both with Brown & Williamson?
15 A Yes.
16 Q When you joined the institute -- or how can
17 I -- should I call it an institute?
18 A Yes.
19 Q When you joined the institute, did you make
20 a review or study of how the grant money was
21 being spent?
22 A Yes.
23 Q Describe for me what you did.
24 A I reviewed how the funds were dispensed,
25 what kind of scientific review was available
5530
1 for that, and whether or not it was
2 effective in advancing knowledge on tobacco
3 and health.
4 Q What did you find, sir? Upon your review of
5 the grants and how the money was being
6 spent, what did you find?
7 A I thought it was totally wasted.
8 Q Why?
9 A I thought it was being used for ineffective
10 research, I thought, for the most part, and
11 sometimes it was funding, I think, of
12 extremely bad research and it did not have a
13 good peer review mechanism in place.

14 Q What does peer review mechanism mean?
15 A It means that it's reviewed by the
16 appropriate scientific personnel and its
17 scientific merits are evaluated.
18 Q This is Exhibit, 16, sir. Would you
19 describe that document, please, when counsel
20 gives it to you.
21 A This is a document that I wrote in 1981
22 describing the program's productivity at the
23 Kentucky Tobacco Research Board, Tobacco and
24 Health Research Institute.
25 Q And you generated this in 1981?

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1 A Yes.
2 Q Did you point out that there were deplorable
3 examples of large unaccountable
4 expenditures?
5 A Yes.
6 Q Did you describe the research -- some of the
7 research as a cesspool?
8 A Yes.
9 Q Did the cigarette companies point with pride
10 to the Kentucky program as being an example
11 of solid, sound scientific research?
12 A Yes.
13 Q How do you know that?
14 A I was told that.
15 Q About who?
16 A By different people associated with the
17 industry. I was also told it was not a good
18 program.
19 Q By whom?
20 A By industry representatives.
21 Q Some told you it was good, and some told you
22 it wasn't? Do you remember which one told
23 you it wasn't?
24 A Well, Mr. Pepples told me it wasn't.
25 Mr. Clements told me in very great detail

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1 that it was not.
2 Q Mr. Clements being the head of the Tobacco
3 Institute? Which Clements is it?
4 A Senator Clements.
5 Q Senator Clements with the Tobacco Institute?
6 A Yes.
7 Q Who told you it was doing good research?
8 A Well, the people that were there told me it
9 was doing good research.
10 Q Okay. Did you study specifically the work
11 of a Dr. Lester Bryant at East Tennessee
12 State University?
13 A Yes.
14 Q Did you visit that institution?
15 A Yes.
16 Q With whom?
17 A With -- I think it was DeBaun Bryant and the
18 head of the Kentucky Tobacco Research Board,
19 Mr. Tom Harris, and some scientists that I
20 had asked to go along and review the program
21 with me.
22 Q What was the nature of the animal work that
23 was being done at East Tennessee State?
24 A It was a monkey smoking project.

25 Q The monkeys were being taught -- or
5533
1 supposedly being taught to breathe smoke?
2 A That's correct.
3 Q What did you find when you went there?
4 A It was my observation that they were not
5 inhaling the smoke.
6 Q They weren't inhaling the smoke?
7 A That's correct.
8 Q And what effect would that have -- if the
9 monkeys weren't inhaling the smoke, what
10 effect would that have on the findings?
11 A Well, it would -- it would be of
12 questionable relevance, I would think, if
13 they were not inhaling the smoke.
14 Q Doctor, once you get this document to orient
15 you, look in the back and you'll see
16 handwritten notes which have been attempted
17 to be retyped by my office.
18 A Yes.
19 Q Do you recognize your handwritten notes?
20 A Yes.
21 Q These were contemporaneous with what?
22 A I wrote them, I think, on the -- part of it
23 on the plane coming back; and I wrote them
24 relative to the site visit.
25 Q To East Tennessee State?

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1 A Yes.
2 Q And you recorded what you -- at the time
3 contemporaneous or shortly after you left
4 the site visit?
5 A That's correct.
6 Q Okay. Were these studies of animals had
7 been on -- on monkeys, had been on animals
8 that scientists would consider close to
9 human beings in their respiratory
10 functioning?
11 A Yes.
12 Q Could such a study, if it had been properly
13 done, have had value with respect to smoking
14 cigarettes and human disease?
15 A Yes.
16 Q Was this work being done properly in your
17 view at the time?
18 A No.
19 Q Did you make a studied review of
20 Dr. Bryant's work for the Kentucky Tobacco
21 Institute?
22 A Yes.
23 Q What were some of your major findings of
24 this study, sir?
25 A I thought it was very poor quality research

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1 and should not be continued.
2 Q And what did you do, sir?
3 A I recommended the termination of the
4 project.
5 Q You terminated the project?
6 A Yes, sir.
7 Q Prior to your terminating the project, had
8 the Kentucky Tobacco Research Institute made
9 the monkey inhalation studies look like good

10 science; or had they represented or
11 publicized that it was good science?
12 A It was considered their pride.
13 Q Their pride?
14 A Yes, sir.
15 Q And you shut down their pride?
16 A Yes, sir.
17 Q When you did that, did you make any enemies,
18 to your own observation?
19 A Most surely so.
20 Q What happened to you as a result of your
21 terminating some of these grants?
22 A Lots of bad things.
23 Q Well, were you fired?
24 A Yes.
25 Q Were charges made against you that you had
5536
1 acted improperly in directing the Kentucky
2 institute?
3 A Yes.
4 Q Did you demand an investigation?
5 A Yes.
6 Q Why?
7 A The charges were wrong.
8 Q And what happened as a result of the
9 investigation?
10 A It was investigated, and I felt I was
11 exonerated.
12 Q You were exonerated?
13 A Yes, sir.
14 Q Who investigated?
15 A Well, everyone from the district attorney to
16 a specially appointed board that included
17 National Academy of Science members.
18 Q After you left the Kentucky Tobacco Health
19 Research Institute, where did you go?
20 A To the University of Texas Health Center at
21 Tyler.
22 Q Prior to your going --
23 A Well.
24 Q -- to UTT, did you work at somewhere else?
25 Did you stay at the University of Kentucky
5537
1 for a period of time?
2 A I had a young daughter that I wanted to be
3 able to graduate from high school. So, I
4 stayed there longer than I otherwise would
5 have.
6 Q So, after you left the institute, you
7 remained at the University of Kentucky?
8 A Yes.
9 Q In what capacity, sir?
10 A As a professor of medicine.
11 Q Sir, when did you leave Kentucky,
12 approximately?
13 A In 1985, in the end of June, 1985.
14 Q And where did you go?
15 A To the University of Texas Health Center at
16 Tyler.
17 Q Did you move there in the field of lung
18 disease research?
19 A Yes, sir.
20 Q Did you subsequently change career focus?

21 A Yes, I did.
22 Q And what did you change to?
23 A The field of nutrition.
24 Q Nutrition?
25 A Yes.

5538

1 Q Why did you do that?
2 A I attended some programs on nutrition, and I
3 found it extremely interesting and I wanted
4 to pursue it, thought it was an important
5 subject.
6 Q Do you currently treat patients for
7 nutritional purposes?
8 A I do research on patients with a nutritional
9 focus.
10 Q Doctor, when you went to UT Tyler, did your
11 contacts with the cigarette industry or
12 their lawyers end?
13 A Initially.
14 Q Did it resume?
15 A Yes.
16 Q How did it resume?
17 A They visited us.
18 Q Who is "us," sir?
19 A The University of Texas Health Center
20 administration and myself.
21 Q Did you -- were you engaged to do any type
22 of literature research?
23 A Yes, we were.
24 Q Were you engaged to attend scientific
25 meetings?

5539

1 A Yes.
2 Q Did you write articles on tobacco and health
3 issues while doing work for the cigarette
4 companies? Did you publish articles on
5 cigarette disease while you were a
6 consultant receiving compensation in part
7 from the cigarette companies?
8 A I was never paid other than by the
9 University of Texas Health Center at Tyler.
10 Q Let me rephrase it. Did the cigarette
11 companies pay to the University of Texas
12 compensation for your time?
13 A Yes. I --
14 Q Yes, sir. Go ahead.
15 A I was never anything other than a full-time
16 employee of the University of Texas Health
17 Center. The time --
18 Q Did you feel --
19 A The time that was compensated freed me of
20 administrative and clinical responsibilities
21 within the health center. I could do
22 literature reviews and other things.
23 Q Did you feel that you were free to publish
24 what you found in the literature?
25 A Yes.

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1 Q And make comment upon them?
2 A Yes.
3 Q And discuss them at scientific meetings?
4 A Yes.
5 Q You felt you could do that?

6 A Yes. I did that.
7 Q Did anyone at the cigarette companies ever
8 tell you you couldn't do that?
9 A No.
10 MR. NEWBOLD: Objection.
11 Privileged.
12 A No.
13 Q Did there come a time when your contact with
14 the cigarette companies ended?
15 A Yes.
16 Q When?
17 A In August of 1996.
18 Q Now, Doctor, I want to go back. Earlier I
19 asked you some general questions about
20 whether Dr. Alan Rodgman of RJ Reynolds
21 communicated with you scientist to scientist
22 during the '70s and '80s. Do you recall
23 that?
24 A Yes.
25 Q Doctor, this report is dated 1962 and is
5541
1 authored by Alan Rodgman. Is that the same
2 Alan Rodgman with whom you had professional
3 contact, scientist to scientist?
4 A Yes, sir.
5 Q Now, prior to my giving you a copy of this
6 document sometime late this summer of 1997,
7 had you ever seen that?
8 A No, sir.
9 Q Did I ask you to review it?
10 A Yes.
11 Q Could you summarize for the Court and jury
12 what is contained in this document, Exhibit
13 18, by Dr. Rodgman, dated 1962?
14 A It was entitled a critical and objective
15 appraisal of the smoking and health problem.
16 Q Was this shared with you by Dr. Rodgman
17 either orally or in writing?
18 A No.
19 Q Sir, would you turn to page 7.
20 A Yes.
21 Q Under item E, the Evidence to Date, I quote,
22 "Obviously the amount of evidence
23 accumulated to indict cigarette smoke as a
24 health hazard is overwhelming. The evidence
25 challenging such an indictment is scant."
5542
1 Did I read that correctly?
2 A Yes.
3 Q Did Dr. Rodgman ever express that opinion to
4 you verbally?
5 A Not in that form, no, sir.
6 MR. NEWBOLD: Objection.
7 Privileged.
8 Q Go ahead.
9 A No, sir, not in that form.
10 Q Sir, in this report -- and the one I've just
11 given you, February 12, 1964, I also -- Ron
12 Motley, representing the State of Texas --
13 gave you that document to review, did I not?
14 A Yes, that's correct.
15 Q And you had not seen it prior to 1997?
16 A No.

17 Q Now, Doctor, at my request, did you review
18 these two documents, 18 and 19 -- 18 being
19 1962 and 19 being 1964 -- for the purpose of
20 ascertaining whether the information -- or
21 all of the information contained therein had
22 been shared with you when you were at
23 Harvard? Do you recall me asking you to do
24 that?

25 A Yes. Yes, I do. You asked me to do that.
5543

1 Q Was all of the research information
2 contained in these RJ Reynolds internal
3 scientific reports shared with you while you
4 were at Harvard?

5 A No.

6 Q They were not?

7 A No.

8 Q Doctor, is there important information
9 scientifically on smoking and health
10 contained in these two publications, these
11 two documents?

12 A Yes.

13 Q There are?

14 A Yes.

15 Q Of what kind, sir? Why are they important?

16 MR. NEWBOLD: Objection.

17 Privileged.

18 THE COURT: You can answer it.

19 A There is a variety of information in these
20 reports that characterizes tobacco smoke in
21 a way better, I believe, than can be
22 characterized outside of the industry and
23 has implications for its potential health
24 impact.

25 Q Its potential what?

5544

1 A Health impact.

2 Q Sir, do you believe, as a scientist, a
3 person who has practiced in the field of
4 public health, that these two internal
5 Reynolds documents should have been
6 published for the scientific community to
7 read and learn from?

8 MR. VOICE: Objection.

9 A Yes.

10 Q Why?

11 A Science is built by one fact upon another,
12 building blocks upon another; and to not
13 have all the building blocks slows the
14 process.

15 Q Doctor, do you recall ever seeing Exhibit 20
16 prior to today?

17 A I would have to double-check to be sure. I
18 can't --

19 Q Well, let me put it this way: Prior to
20 1997, had you ever seen this document?

21 A No, no.

22 Q Dr. Rodgman is a scientist, sir?

23 A Yes.

24 Q For RJ Reynolds?

25 A Yes.

5545

1 Q Okay. Do you see where Dr. Rodgman states

2 in the last sentence that certain -- and I
3 can't pronounce any of these things, looks
4 like chemical compounds -- was omitted from
5 our manuscript because of the reported
6 carcinogenicity of the latter three
7 compounds?
8 A Yes.
9 Q Were you ever provided, sir, with studies by
10 Reynolds dated prior to 1962, that indicated
11 that these chemical compounds that are
12 listed in this document were found to be
13 carcinogenic?
14 MR. NEWBOLD: Objection.
15 Privileged.
16 A Not until you gave me these other documents.
17 Q Well, did Dr. Rodgman ever discuss with you
18 that -- whether or not Reynolds had a policy
19 of selective publications of their findings
20 in their research laboratory?
21 A No.
22 No.
23 Q Do you know whether or not Philip Morris did
24 research in Europe?
25 A Yes.

5546

1 Q Have you ever visited any of the facilities
2 in Europe?
3 A Yes.
4 Q Which one?
5 A I visited several.
6 Q Are you familiar with the work of a
7 Dr. Adlkofer -- if I'm pronouncing that
8 correctly -- a German scientist?
9 A Adlkofer.
10 Q Adlkofer?
11 A Yes.
12 Q Are you familiar with that? I was close.
13 They spell their names too long over there.
14 What do you remember about the visit
15 with Dr. Adlkofer?
16 A Adlkofer.
17 Q Yes, sir, the same guy.
18 A Several -- I have had several visits with
19 him.
20 Q And what type research was he doing?
21 A He was doing nicotine titration research.
22 Q Like yours?
23 A Yes, before ours.
24 Q Before yours?
25 A Yes.

5547

1 Q Did you know -- were you aware of the
2 research he had done or all of the research
3 he had done?
4 A He gave us some of the equipment to do it.
5 Q Exhibit No. 22 is a Lorillard document dated
6 August 17, 1960. Do you have that in front
7 of you, sir?
8 A Yes.
9 Q Do you see the name of Dr. Spears?
10 A Yes.
11 Q Do you see the last paragraph?
12 A There's only one paragraph.

13 Q Okay. The middle of the only paragraph.
14 A Yes.
15 Q "However it has been recently decided in the
16 interest of the company and the tobacco
17 industry that a paper dealing with compounds
18 which are controversial in the health
19 aspects of smoking should not be presented."
20 Were you aware of that attitude of
21 Dr. Spears?
22 MR. NEWBOLD: Objection.
23 Privileged.
24 A No.
25 Q Do you agree that if cigarette compounds are
5548
1 found to be controversial in the health
2 aspect, that those things should not be
3 published?
4 A I think they should be published.
5 MR. MOTLEY: May I have just a
6 moment, Your Honor?
7 Q Dr. Huber, in 1992, did you advise lawyers
8 for the cigarette companies that in your
9 opinion the mechanisms by which cigarette
10 causes disease had been established or was
11 on the -- clearly on the way to be being
12 established?
13 MR. NEWBOLD: Objection.
14 Privileged.
15 A Yes.
16 Q Did you do that in writing?
17 A Yes.
18 Q Now, Dr. Huber, do you believe, sir, that if
19 you had been able to continue your
20 experiments with rats with respect to the
21 rats breathing smoke and developing
22 emphysema, do you believe that you would
23 have been able many years ago to have found
24 the exact way that cigarette smoke causes
25 emphysema?
5549
1 MR. NEWBOLD: Objection.
2 Privileged.
3 A Yes.
4 Q Why do you say that, sir?
5 MR. NEWBOLD: Objection.
6 Privileged.
7 A We had important information on -- that was
8 advancing science on the mechanisms by which
9 these processes could occur.
10 Q And you requested funding from the cigarette
11 companies --
12 A Yes.
13 Q -- to continue it?
14 A Yes.
15 Q It was not forthcoming?
16 A Correct.
17 Q Doctor, how many American citizens do you
18 believe develop chronic obstructive lung
19 disease and emphysema from smoking
20 cigarettes every year?
21 MR. NEWBOLD: Objection.
22 Privileged.
23 A Millions.

24 Q In various degrees? I'm talking about all
25 over the world now.

5550

1 A Yes.

2 Q Doctor, are you familiar with the World
3 Health Organization's prediction that 3
4 million citizens of various countries
5 throughout the world will die, year end and
6 year out, from cigarette smoking?

7 MR. NEWBOLD: Objection.
8 Privileged.

9 Q Are you aware of that prediction?

10 A It's an enormous number, yes.

11 Q Doctor, do you feel -- have a feeling of --
12 somewhat of being used or manipulated over
13 the course of your involvement with the
14 cigarette companies since 1972?

15 MR. NEWBOLD: Objection.
16 Privileged.

17 A Yes.

18 Q Why?

19 A Information was not shared with us that
20 would have been extremely helpful.
21 Scientific support that appears to have been
22 available was not given to us, and the
23 commitment to funding that was promised was
24 not given.

25 Q When you first met -- started meeting this
5551

1 summer with Mr. Reaud and myself, did you
2 advise various persons either within
3 cigarette companies or representing
4 cigarette companies that you had been
5 contacted by the State of Texas lawyers?

6 A Yes, on several occasions.

7 Q Did they make statements to you about
8 talking to State of Texas attorneys?

9 MR. NEWBOLD: Objection.
10 Privileged.

11 A The first -- the first calls were unreturned
12 and --

13 Q Unreturned by whom?

14 A Well, I attempted to reach different
15 individuals.

16 Q Who?

17 A Mr. McDermott, Mr. Andrade, and did not
18 receive return calls. Mr. Stanford, him I
19 did talk to; but who did not return my
20 request. And those were the calls I made --
21 and their secretaries.

22 Q Have you -- since this deposition has been
23 scheduled back in August, I think it was
24 first scheduled, have you received
25 communications from lawyers representing
5552

1 cigarette companies about giving a
2 deposition?

3 A Yes.

4 Q Did any representative of any cigarette
5 company threaten you or try to intimidate
6 you from talking to Mr. Reaud or myself?

7 MR. NEWBOLD: Objection.
8 Privileged.

9 A I was advised not to talk to you.
10 Q You were advised not to talk to me?
11 A And that -- you know, other comments to that
12 effect.
13 Q Sir, I'm asking you specifically what
14 comments were made in regard to the taking
15 of this deposition?
16 MR. NEWBOLD: Objection.
17 Privileged.
18 THE COURT: The Court will ask that
19 question. I'm asking you, what comments
20 were made to you in regard to you giving
21 this deposition?
22 THE WITNESS: The keep the faith,
23 to hold the line, to not be seduced by you.
24 THE COURT: Seduced by me?
25 MR. MOTLEY: By Mr. Motley. He's

5553

1 pointing to me, Your Honor.
2 A Comments to that effect.
3 Q Were you ever -- was it ever suggested to
4 you that the cigarette companies might come
5 after you or try to penalize you financially
6 in any way?
7 MR. NEWBOLD: Objection.
8 Privileged.
9 THE COURT: And I'll ask that
10 question.
11 A The implication was that did I fully
12 appreciate the full weight of Shook Hardy
13 and Jones Day industry representatives.
14 Q What do you mean by "the implication"?
15 A That those were very powerful law firms and
16 that -- that I did feel concerned.
17 Q For your safety or financially?
18 A I never felt concern for my safety and I've
19 never felt concerned for my own financial
20 needs, but that of my family.
21 Q You were concerned about your family?
22 A Very much so.
23 Q And were you upset by these phone calls?
24 A Yes.
25 Q Are you glad to get this testimony off your

5554

1 chest, sir?
2 A Absolutely.
3 Q And what did Dr. Colby tell you?
4 A He just apologized for not having called me
5 for a long time, that he was ill.
6 Q What else did he tell you?
7 A That there shouldn't be a lawsuit, that
8 there -- as an employee of Reynolds and
9 Jones Day, I was entitled to counsel; and I
10 would be provided and whatever else was
11 needed.
12 Q Let me try it again. You said in answer to
13 questions by Mr. Motley that you made
14 reports to the tobacco industry about your
15 work at Harvard while it was ongoing; right?
16 A While it was ongoing and when it was
17 finished.
18 Q All right. And with respect to the
19 substance of those reports, weren't the same

20 things also reported in your published work
21 as a result of your Harvard studies?
22 A Some were, and some were not.
23 Q Sitting here today, can you distinguish
24 between which were and which were not?
25 A Well, I could with review of the records,
5555
1 yes.
2 Q Without it, you can't?
3 A It would be very difficult.
4 Q All right.
5 A It was an enormous amount of information.
6 Q One more question on that score. Was the
7 first contact you had with today's
8 appearance, sir, an approach you made to
9 Mr. Reaud where you told him you were
10 interested in talking to the plaintiff in
11 this case?
12 A Well, there were several conversations.
13 When my wife and I met with him, we felt
14 there was nothing in our general files, or
15 whatever, that was not open to the public;
16 and if they wanted that as part of their
17 interest, they were certainly welcome to it.
18 Q How did that subject come up, sir?
19 A We brought that up with him.
20 Q Why did you bring that up with him?
21 A Well, my wife was concerned why he was
22 coming to see us.
23 Q Putting aside the patient relationship,
24 which is none of our business, how did the
25 subject of the tobacco litigation come up
5556
1 between you?
2 A We raised it with him.
3 Q And why did you raise it with him?
4 A Well, my wife was concerned why he was
5 there.
6 Q How did you know that he was connected to
7 the tobacco litigation?
8 A Mr. McDermott told me.
9 Q How did Mr. McDermott know that you were
10 connected with Mr. Reaud?
11 A I asked him who Mr. Reaud was. That, you
12 know, he was a lawyer that came to see us
13 and that did he know him.
14 Q So when a lawyer comes to see you, that you
15 don't have any knowledge of what he's doing,
16 you call up other lawyers and ask, gee, do
17 you know this guy?
18 A I didn't call Mr. McDermott and ask him
19 that.
20 Q Okay. How did the subject of Mr. Reaud come
21 up between you and Bob McDermott?
22 A It came up in passing in a conversation on
23 another matter; and he said, you know,
24 you've got to be kidding. And I didn't know
25 who Mr. Reaud was or what his role in this
5557
1 litigation was.
2 Q So, you disclosed to Bob McDermott that
3 Mr. Reaud had come to you as a patient?
4 A Yes.

5 Q Okay. And you had had no dealings with
6 Mr. Reaud at all at that time, as a
7 representative of the State of Texas in this
8 lawsuit?
9 A No.
10 Q I guess I missed something. How did you
11 happen to mention Mr. Reaud to
12 Mr. McDermott?
13 A I was just so impressed with Mr. Reaud, I
14 wanted to know who he was.
15 Q But it's your testimony that you had no idea
16 at that time that Mr. Reaud had anything at
17 all to do with the tobacco litigation?
18 A That's correct.
19 Q You subsequently found out that he did?
20 A Mr. McDermott told me.
21 Q Mr. McDermott told you that he was a lawyer
22 for the State of Texas in the pending Texas
23 case.
24 A That's correct.
25 Q And what was your response to that?

5558

1 A I was surprised.
2 Q Go back to it again. Between you and the
3 lawyers for the State of Texas in this case,
4 who was the first to bring up the subject of
5 your talking about tobacco matters to the
6 State of Texas lawyers, you or they?
7 A I don't remember for sure. I think we
8 brought it up, my wife and I.
9 Q Why?
10 A Well, we wanted to make -- we wanted to be
11 comfortable in seeing Mr. Reaud as a patient
12 and make sure that that is why he was coming
13 to see us. My nurse, my wife had expressed
14 concern that his motivation was not as a
15 patient.
16 Q And once he assured you that it was, why
17 wasn't the entire subject of tobacco
18 dropped?
19 A Well, I think it fairly much was.
20 Q So, at no time did -- did you approach
21 Mr. Reaud and tell him that you were
22 interested in talking to the plaintiffs
23 about tobacco?
24 A When my wife and I discussed that with him,
25 we felt we could discuss anything we wanted

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1 to with him, including tobacco; and we asked
2 him a lot of questions.
3 Q And why did you want to discuss tobacco with
4 him?
5 A We wanted to know why he was coming to see
6 us, if he was coming to see us legitimately
7 as a patient or whether he was coming to see
8 us for other motivations.
9 Q And once he assured you that he was coming
10 to see you legitimately as a patient, why
11 didn't the subject of tobacco just get
12 dropped?
13 A It did.
14 Q Oh, it did?
15 A I think so.

16 Q And it was not raised again.
17 A Not until we got a telephone call.
18 Q And from whom did you get the telephone
19 call?
20 A From Ann Ritter.
21 Q And what did Ann Ritter say to you?
22 A She said that she had talked to the
23 University of Texas administration, that she
24 had talked to two people who have
25 administrative positions, and that she felt
5560
1 that she would like to show me -- she felt
2 as though she had been reassured by them
3 that I would talk to her and that she would
4 like to show me some documents that they had
5 acquired and just asked me to review those
6 documents.
7 Q And did she have -- did the University of
8 Texas officials accurately represent your
9 position, that you would be willing to talk
10 to her?
11 A We're willing to talk to anybody who wants
12 to come talk to us.
13 Q Well, had they previously discussed with you
14 whether you were willing to talk to
15 representatives of the plaintiff in this
16 case?
17 A Not specifically that I can remember. I
18 mean we've talked about it in general terms.
19 Q You and your employer, you mean?
20 A That's the administration that I worked for.
21 Q And when did that first occur?
22 A Oh, it's occurred at several times along the
23 way.
24 Q At any time did you mention your consultancy
25 with Jones Day and Shook Hardy to the
5561
1 officials in the administration when the
2 subject came up?
3 A My goodness, yes. They had copies of
4 everything we ever did.
5 Q Including the copies of the agreements that
6 set forth the confidentiality provisions;
7 right?
8 A That's -- they signed some of them.
9 MR. MOTLEY: Can you hold it for a
10 second.
11 Judge, can Mr. Ohlemeyer and I
12 approach?
13 THE COURT: I think it might be a
14 good time to take a break.
15 MR. MOTLEY: That's what I was
16 going to suggest.
17 THE COURT: We'll break for about
18 15 minutes, ladies and gentlemen.
19 (Standard admonition)
20 MR. CASSELL: All rise.
21 (A brief recess was taken.)
22 MR. CASSELL: All rise.
23 THE COURT: Be seated. We're back,
24 jury is back, with the alternates.
25 Go ahead.

5562

1 (Video resumed)
2 Q Okay. Directing your attention briefly,
3 once again, to Harvard. In 1971 you were
4 the director of the respiratory disease
5 clinic at the Harvard unit of the Boston
6 City Hospital; is that correct?
7 A Yes.
8 Q And in 1971 you had discussions with
9 representatives of the cigarette industry
10 about receiving a grant to conduct research
11 related to smoking and health?
12 A Yes.
13 Q And as a matter of fact, a number of
14 cigarette manufacturers awarded Harvard
15 Medical School a broad based grant to launch
16 a five-year investigation into pulmonary
17 diseases; is that correct, sir?
18 A Amongst other things, yes.
19 Q And your goal at that time was to do good
20 scientific research to find out what the
21 truth was?
22 A Yes.
23 Q And that grant was for approximately \$2.8
24 million?
25 A The initial grant, I believe so.

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1 Q And there were similar grants like that
2 awarded to awarded to other universities
3 around the United States; including, for
4 example, Washington University in St. Louis?
5 A Yes.
6 Q And this money was given directly to Harvard
7 University and not to you personally; is
8 that correct?
9 A Checks were made out to me, and I turned
10 them over to Harvard University.
11 Q And the money was used for research,
12 education and development?
13 A That's correct.
14 Q And all the funding and the related research
15 was actually carefully reviewed by an elite
16 Harvard advisory committee, wasn't that
17 correct? Didn't they review what you did?
18 A Most of it, not all of it.
19 Q Okay. And did the committee ever find any
20 suggestion of any tobacco industry influence
21 on any of your research or any of your
22 publications?
23 A No.
24 Q As a matter of fact, as a scientist, you
25 would not have allowed the industry to

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1 influence your research or your
2 publications, would you, sir?
3 A No, but I think they did.
4 Q Did you ever tell Harvard that you thought
5 that the tobacco industry was influencing
6 your research or your publications at
7 Harvard?
8 A I expressed my concern to the Harvard
9 administration, which was communicated
10 actually by Mr. Shinn and his internal memo,
11 that I was concerned that we were being not

12 influenced but that there was too much
13 interest from external sources, such as the
14 industry lawyers.
15 Q Was there any research project that you
16 wanted to do that was suppressed, that you
17 were not allowed to do while you were at the
18 Harvard program?
19 A Deliberately suppressed?
20 Q Yes, sir.
21 A No one could do that.
22 Q Was there any publication that you wanted to
23 make that you were not allowed to make while
24 you were at Harvard, by the tobacco
25 industry?

5565

1 A No, sir.
2 Q And you testified, I think, that David R.
3 Hardy was the liaison between the tobacco
4 industry and the Harvard project?
5 A Not in the beginning.
6 Q Did David Hardy -- you testified you
7 testified that you thought that David Hardy
8 had some influence on the Harvard project
9 when you were there; is that correct, sir?
10 A Yes, both good and bad.
11 Q Okay. And what was the good part that David
12 Hardy did?
13 A We asked -- Shook Hardy & Bacon was asked to
14 be the interceder when we wanted things from
15 the industry at Mr. Hardy's request; and to
16 the degree that he facilitated those
17 requests, it helped the program.
18 Q Okay. Did David Hardy ever tell you you
19 could not do any particular research
20 project?
21 A He discouraged us from doing certain things
22 at a certain time, but he never told us we
23 could not do something.
24 Q All right. Did he ever tell you that you
25 could not publish any article?

5566

1 A No, sir.
2 Q Who is the next person from the Ness Motley
3 firm, or any lawyer representing the State
4 of Texas in this tobacco litigation, that
5 contacted you after you were first contacted
6 by Ann Ritter?
7 A I think I called Mr. Reaud to ask him who
8 Ann Ritter was, and he suggested that I not
9 probably talk to her.
10 Q Okay. That was your first -- after you
11 talked to Ann Ritter, then you telephoned
12 Mr. Reaud?
13 A Yes, sir.
14 Q And when was that?
15 A Probably towards the end of June.
16 Q Okay. And after you had that telephone
17 conversation with Mr. Reaud at the end of
18 June of 1997, what, if anything, did you do?
19 A I sought local counsel. I asked for advice,
20 and that's what I did. I called
21 Mr. McDermott. I called Mr. Stanford.
22 Q All right. When was the first time that you

23 had a personal visit from anyone from the
24 Ness Motley firm or any attorney
25 representing the State of Texas?

5567

1 A A personal visit as opposed to a patient
2 visit?
3 Q When was the first time that you had any --
4 when was the next time that you had any
5 visit from any attorney representing the
6 State of Texas, in which a topic of
7 discussion was the cigarette litigation
8 pending in the State of Texas?
9 A I think when Mr. Motley came up and wanted
10 to know where the documents were from his
11 Freedom of Information Act request.
12 Q Okay. And when did Mr. Motley first come to
13 see you?
14 A Mr. Motley would probably know the date. I
15 don't remember.
16 Q Well, was it in June of 1997?
17 A Might have been July.
18 Q In July?
19 A Somebody could check that, though.
20 Q Okay. And did Mr. Motley come to your home
21 in [DELETED]; or did he come to your
22 doctor's office?
23 A Well, I really don't have a doctor's office.
24 He came to the University component where we
25 had our offices.

5568

1 Q Okay. And was he alone, or did he have
2 anyone with him?
3 A There was a large group of people with
4 him -- well, relatively.
5 Q And how many people were with him?
6 A I didn't take a head count.
7 Q More than five?
8 A More than five.
9 Q And did he introduce those people to you?
10 A Yes, he did.
11 Q And do you recall any of their names?
12 A Well, I recall Mr. Reaud's name and I recall
13 Mr. Kaiser, I think was there, and there
14 were several other people.
15 Q Okay. So you remember Mr. Motley,
16 Mr. Reaud, and Mr. Kaiser were a part of
17 this meeting at the University --
18 A Right.
19 Q -- in July of 1997?
20 A I believe it was July.
21 Q Okay. And how long -- and was your wife
22 with you then?
23 A Yes. Not initially, but she came.
24 Q Okay. And did that meeting take place in
25 your office?

5569

1 A You could call it that.
2 Q Okay. And how long did the meeting last?
3 A Gee, I didn't keep track of the time. I had
4 seen patients in the morning. I'm not sure
5 what time they arrived, and they left by
6 late afternoon.
7 Q Okay. And during that visit, what did Mr.

8 Motley say to you -- or was he the spokesman
9 of the group, or was it someone else?
10 A Yes, he was the spokesman.
11 Q And what did Mr. Motley say to you?
12 A He wanted to know what had happened to his
13 request for information. I told him.
14 Apparently he never received it. He wanted
15 to know what relationship I had had in -- at
16 various institutions, doing tobacco and
17 health research. He was primarily focused
18 on the Harvard project and the University of
19 Kentucky.
20 Q During that period of time, did you tell him
21 that you had done work in the past for Jones
22 Day or Shook Hardy & Bacon?
23 A As part of the University of Texas, yes.
24 Q You did tell him that.
25 A Yes.

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1 Q And you told him that in July of 1997.
2 A Yes.
3 Q And what did he say when you told him that
4 you had done work for Shook Hardy & Bacon
5 and Jones Day?
6 A He was -- seemed to be primarily interested
7 in the Harvard project and in the Kentucky
8 program.
9 Q Okay. Did he ask you whether you had signed
10 any agreements with Jones Day or Shook Hardy
11 & Bacon?
12 A I think so. I believe so.
13 Q And what did you tell him?
14 A I told him that there was probably a whole
15 filing drawer full of different agreements
16 that had been signed either by the
17 university or by myself or whatever.
18 Q Okay. And did he ask to see those
19 agreements?
20 A Yes.
21 Q And did he look --
22 A Well, I don't know if he asked. I
23 volunteered to show him.
24 Q And did you show him the various agreements
25 that you had with Jones Day and Shook Hardy

5571

1 and the university pertaining to your work
2 for those law firms?
3 A I couldn't find any copy in my files of an
4 agreement, per se, with Jones Day. We did
5 have -- there was a series of documents and
6 the latest had been signed by the university
7 with Shook Hardy & Bacon and I gave him, I
8 think, probably copies of those and I'm not
9 sure if I gave him copies of other
10 documents.
11 Q All right. Did Mr. Motley or any of Mr.
12 Motley's group give anything to you?
13 A I don't think so --
14 Q Okay.
15 A -- but, you know, I'm not sure. I don't
16 think so.
17 Q During this visit, did Mr. Motley show you
18 any documents?

19 A Yes, he had brought in a couple stacks full
20 of documents.
21 Q And were some of most documents the ones you
22 testified about today, which Mr. Motley said
23 that he had given to you during a meeting?
24 Was that the first meeting that you had with
25 him or the second meeting?

5572

1 A That was the first meeting I had with Mr.
2 Motley.
3 Q Okay. Did Mr. Motley give you any documents
4 other than the ones that he has marked as
5 exhibits today and about which you have
6 testified?
7 A I -- probably. I mean, I have several
8 documents. I didn't count them. I don't
9 have an inventory of them, but it seems like
10 there was more than the handful that have
11 been introduced today.
12 Q And do you still have copies of those
13 documents?
14 A Yes.
15 Q And where are those?
16 A They're in our -- I think they're in our
17 facility at the university.
18 MR. PATRICK: Tape two.
19 Q When you concluded that meeting in July of
20 1997, how did you leave it? What were your
21 parting words, "I'll see you later," make a
22 date to "see you at some future time,"
23 exactly when?
24 A No, I made no further arrangements. Mr.
25 Motley asked again if he could have the

5573

1 information that he had requested the year
2 before.
3 Q Okay. At any time did Mr. Motley ever
4 suggest that you should hire an attorney to
5 protect your interests in this matter?
6 A No.
7 Q Did you have an occasion to meet with Mr.
8 Motley or any other member of the attorneys
9 representing the State of Texas after your
10 first visit in July of 1997?
11 A I met with Mr. Motley on one more occasion.
12 Q And when was that?
13 A The week before school started which, I
14 would guess, is probably the first week in
15 August.
16 Q Okay.
17 A I met with him one day.
18 Q You met with him for one day in the first
19 week of August.
20 A I think.
21 Q Let me ask you something. Did you also meet
22 at some time with two law professors from
23 the University of Texas?
24 A Yes.
25 Q When did you meet with the law professors

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1 from the law University of Texas?
2 A I wouldn't -- I didn't write the date down
3 and I couldn't give you the date, but

4 somewhere in that period of time.
5 Q Did you meet with the law professors from
6 the University of Texas before or after your
7 second meeting with Mr. Motley?
8 A I had asked Mr. Reaud that I not be in any
9 way compromised or placed in a conflict, and
10 he indicated to me he would have that issue
11 reviewed by faculty at University of Texas
12 who had expertise in ethics.
13 Q Okay. Do you recall whether you -- did you
14 actually meet with the two University of
15 Texas professors?
16 A Yes.
17 Q And where did you meet with them?
18 A In another one of our facilities.
19 Q Okay. And do you recall whether you met
20 with the University of Texas law professors
21 before or after your second meeting with Mr.
22 Motley?
23 A I'm not sure. I think we'd have to check
24 those dates. I don't know. I don't
25 remember the day I met with them. I mean,

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1 there's no way I could determine that.
2 Q Okay. Where did you -- where was your
3 second meeting with Mr. Motley in the first
4 week of August of 1997?
5 A In his office.
6 Q And in his office in what city?
7 A In Charleston.
8 Q Okay. And then who was at the meeting with
9 Mr. Motley? Was it you and your wife?
10 A No, Mr. Westbrook.
11 Q Okay. It was Mr. Westbrook and you and your
12 wife. Mr. Motley was not there?
13 A No. Mr. Motley, Mr. Westbrook and I met.
14 Q And did you bring anything with you to that
15 meeting from Tyler?
16 A Besides my wife and children?
17 Q Yes, sir.
18 A No.
19 Q Swimming suits, suntan lotion?
20 A I probably -- I'm not sure, and I really
21 can't remember accurately. I probably
22 brought the documents that Mr. Motley had
23 sent me to look at.
24 Q Okay. And what did you discuss at that
25 second meeting with Mr. Motley and

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1 Mr. Westbrook?
2 A Documents.
3 Q And those were the documents that Mr. Motley
4 had given you.
5 A Yes, or showed me in his office.
6 Q And what did -- can you remember what your
7 conversation was about?
8 A It was about the documents. If I had the
9 documents in front of me, I could recall,
10 you know, in general terms what I said about
11 the documents.
12 Q All right. And during that conversation --
13 and during that meeting that you had with
14 Mr. Motley and Mr. Westbrook, did you tell

15 Mr. Motley and Mr. Westbrook about any
16 conversations that you had had with
17 Mr. McDermott at Jones Day pertaining to the
18 subjects or issues of smoking and health?
19 A To -- I mean, that was not the focus of our
20 discussion at all. It may have been
21 mentioned in passing, but it was focused on
22 the documents.
23 Q Did you have any discussion with Mr. Motley
24 and Mr. Westbrook about any conversations
25 that you had, may have had with Lee Stanford

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1 or anybody at Shook Hardy & Bacon?
2 A To the similar extent.
3 Q Did you discuss with Mr. Motley the work you
4 did at Harvard?
5 A Yes.
6 Q Did you discuss with Mr. Motley the work you
7 did in Kentucky?
8 A Yes.
9 Q Did you discuss with Mr. Motley any of the
10 work that you had been doing insofar as
11 literature review for Shook Hardy or Jones
12 Day?
13 A Only in a very limited and tangential sense
14 in terms of publications that we had
15 developed and published, and he was focused
16 on Harvard and Kentucky.
17 Q All right. And at that time did you tell
18 Mr. Motley or Mr. -- or anyone from his
19 office that you had a consulting agreement
20 with Jones Day, Shook Hardy, and through the
21 University of Texas?
22 A I'm sure we mentione
18 left; correct?
19 A That's right. That's in conformity with the
20 law.
21 Q Is it not true, sir, that before 1990 Philip
22 Morris manufactured cigarettes and sold
23 cigarettes in Third World countries that did
24 not have any warning labels on them
25 whatsoever?

5595

1 A Before when?
2 Q 1990?
3 A Yes, there were some markets, I believe.
4 Q So you were selling cigarettes in Europe and
5 in the United States that had warning labels
6 on it, but you were selling it to Third
7 World countries that had no warnings
8 whatever, before 1990?
9 A In some markets, I believe that's right.
10 Q Are you aware of whether or not Philip
11 Morris, for a period of time, paid the legal
12 fees of the Liggett Group in tobacco-disease
13 litigation?
14 A I'm aware we've paid some of the litigation
15 fees, yes.
16 Q And -- And Philip Morris at some point in
17 time stopped paying the lawyer's fees for
18 Liggett?
19 A I -- I believe so.
20 Q Does Philip Morris include the additional

21 "Warning: Smoking is addictive" in packages
22 of Liggett & Myers cigarettes it sells in
23 Europe?

24 A Well, we don't sell Liggett & Myers
25 cigarettes. Let me tell you, we own certain
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1 trademarks which we bought in 1978, and one
2 of them is L&M. What we do is we place on
3 the packs around the world the warning label
4 required by the legislation of each of those
5 jurisdictions. And we have no choice.

6 Q Are you aware that Mr. Lebow has testified
7 that in the -- in the view of the Liggett
8 corporation in the United States, that
9 nicotine is a drug and it is an addictive
10 drug? Are you aware that he made that
11 statement?

12 A I think roughly that statement, yes.

13 Q Yes. And he's the first industry
14 manufacturer of cigarettes in the United
15 States to take that position, that nicotine
16 is a drug and nicotine is addictive;
17 correct?

18 A To the best of my knowledge, yes.

19 Q Do you believe nicotine is a drug,
20 Mr. Bible?

21 A I think it's a drug, but I think it's a drug
22 with very mild pharmacological effects.

23 Q Do you believe cigarettes are a nicotine
24 delivery device?

25 A No, I don't.

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1 MR. PATRICK: Your Honor, the
2 videographer is taking something out of the
3 video that is not supposed to be there.
4 He'll be back on in just a second.

5 THE COURT: Okay.

6 Q I'm not suggesting that you've read every
7 page --

8 A I can guess what it is.

9 Q It's the rulemaking of the Food and Drug
10 Administration, finding that cigarettes are
11 a nicotine delivery devices. You're aware
12 generally they made such a thing as that?

13 A I am.

14 Q And I've placed before you Exhibit 7-A,
15 which is the executive summary, and I'd ask
16 you, please, sir, kindly turn to page X.
17 Are you aware that the Food and Drug
18 Administration, after a considerable period
19 of taking testimony, concluded that there is
20 an emergence of a scientific consensus that
21 cigarettes and smokeless tobacco cause
22 addiction to nicotine and the disclosure of
23 thousands of pages of internal tobacco
24 company documents detailing that these
25 products are intended by the manufacturers

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1 to affect the structure and function of the
2 human body. This new evidence justifies the
3 agency's determination that cigarettes and
4 smokeless tobacco are delivery systems for
5 the drug nicotine.

6 My question to you, sir, is, are you
7 broadly aware that they made that finding?
8 A I am.
9 Q And Philip Morris, amongst others, disagreed
10 with that finding and brought a lawsuit --
11 A That's right.
12 Q -- in federal court; correct?
13 A That's right.
14 Q And when the Food and Drug Administration
15 refers to thousands of pages of internal
16 tobacco company documents, among those
17 thousands of pages are the documents that
18 Philip Morris turned over to the Food and
19 Drug Administration; correct?
20 A Well, I don't know, but I would assume so.
21 Q And you are aware that there are -- or
22 you've heard or read accounts that there are
23 documents of Philip Morris scientists in
24 past times in which they described the
25 cigarette as a nicotine delivery device, are

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1 you not?
2 A I think I recall it being referred to once.
3 And it is a very famous quote, if I
4 remember, yes.
5 Q And are you aware that -- do you know a
6 toxicologist who is employed by Philip
7 Morris named Dr. James Charles?
8 A Yes.
9 Q Are you aware that he described nicotine as
10 a potent, P-O-T-E-N-T, pharmacological drug?
11 A No, I'm not.
12 Q Would you agree with the toxicologist
13 employed by Philip Morris that nicotine is a
14 potent pharmacological drug?
15 A Well, actually I am advised that it -- it
16 has mild pharmacological effects. So I
17 wouldn't agree with what he said because I'm
18 relying upon the senior vice president of
19 research and development in Philip Morris
20 today, and that's what she's told me.
21 Q But you know what a toxicologist is?
22 A I think I do.
23 Q Yes. And you know that Dr. Charles was a
24 senior toxicologist for Philip Morris?
25 A Actually I didn't know that. I didn't know

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1 that.
2 Q Are you aware that Dr. William Dunn, whose
3 name we mentioned earlier, described in 1972
4 that a cigarette is a -- a cigarette pack
5 like this pack of Marlboros that we've been
6 looking at, is a storage container for a
7 day's supply of nicotine?
8 A I've heard that quote.
9 Q And that a cigarette is a dispenser for a
10 dose unit of nicotine?
11 A I've heard that quote, too.
12 Q When you smoke, do you take nicotine into
13 your body?
14 A I believe so.
15 Q You wouldn't countenance even discussing
16 destroying documents from the Surgeon

17 General this day, would you?
18 A Documents from the Surgeon General?
19 Q Withholding documents --
20 A Withholding documents from the Surgeon
21 General.
22 Q Yes.
23 A It would depend on the documents. I'd need
24 to ask my general counsel if they are
25 privileged.

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1 Q So if the documents would be important to
2 the public health of this country, you would
3 ask the general counsel, and if he said, no,
4 we don't want to give those to the Surgeon
5 General, you'd go along with that advice?
6 A Well, I'm not a lawyer.
7 Q Yes, sir.
8 A But as I understand it, there are times when
9 if you waive a privilege, it's something you
10 need to think about very carefully. So I
11 would need to have the general counsel's
12 opinion. I can't make those calls.
13 Q Do you know whether Philip Morris has
14 withheld any documents from the Food and
15 Drug Administration recently that the
16 general counsel told you were privileged?
17 A I have no idea.
18 Q Sir, my last question to you is very simply
19 this. Would Philip Morris agree that a
20 single American citizen who smoked their
21 products for 30 or more years, a single one
22 of them, has ever died of a disease caused
23 in part by smoking cigarettes?
24 A I think there's a fair chance that one would
25 have, yes. Might have.

5602

1 Q How about a thousand?
2 A Might have.
3 Q A hundred thousand?
4 A Might have.

5 MR. PATRICK: Your Honor, that
6 completes the testimony of Geoffrey Bible.

7 THE COURT: All right. Is the

8 Spears
9 next?

9 MR. PATRICK: Yes, Your Honor, we
10 can do the Spears deposition. I didn't know
11 whether or not we may have a matter
12 concerning some documents at this point but
13 we can go ahead with the Spears deposition.

14 THE COURT: All right. Let's start
15 that. This is offered against whom,
16 Counselor?

17 MR. PATRICK: Your Honor, this will
18 be offered against Lorillard only.

19 THE COURT: All right. Court's
20 previously ruled on the admissibility and
21 objections on this, ladies and gentlemen.

22 (Video shown)

23 Q Dr. Spears, could you please state for the
24 record your full name, give me your current
25 address.

5603

1 A Alexander White Spears, III.
2 [DELETED]
3
4 Q Is that your home address, sir?
5 A Yes, it is.
6 Q And what is your business address?
7 A Business address is 714 Green Valley Road,
8 Greensboro, North Carolina. ZIP Code 27408.
9 Q All right. Is that the corporate office of
10 Lorillard?
11 A Yes, it is.
12 Q All right. What is your current position at
13 Lorillard, sir?
14 A Chairman and chief executive officer.
15 Q Are you chairman of the board?
16 A Yes, I am.
17 Q All right. And you're chief executive
18 officer.
19 A That's correct.
20 Q For how long have you had those two
21 positions?
22 A About two years.
23 Q Dr. Spears, does it concern you at all that
24 you are the head of a company that sells
25 millions of cigarettes a year and that

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1 virtually every public health agency in this
2 country believe that cigarettes cause
3 enormous death and disease in this country?
4 Does that concern you at all?
5 A Does it concern? I'm not sure in what
6 context you mean does it concern me.
7 Obviously concerns me that anyone would make
8 accusations regarding products that we
9 produce. The question, of course, is
10 validity of those questions that are being
11 raised. Product is a legal product so that
12 aspect of it doesn't concern me, but I'm
13 sure I'm unhappy with the kind of
14 allegations that have been made regarding
15 the product.
16 Q Do you think it has been scientifically
17 proven, Doctor, that smoking causes any
18 disease in anyone?
19 A Well, that's a very broad statement. I
20 think I would need to know what the specific
21 example is that one is talking about as to
22 whether it causes any disease in anyone.
23 Q Well --
24 A Smoking, like many other things, can
25 potentially aggravate conditions that exist.

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1 So I would need to know more specifically
2 what you're referring to.
3 Q Well, let's talk about lung cancer. Is it
4 your view that smoking has been proven to
5 cause lung cancer in any individual?
6 A No, that's not my view. I don't think it
7 has been proven to cause lung cancer.
8 Q All right. In your view, has smoking been
9 proven to cause emphysema in any individual?
10 A No, I do not believe so.
11 Q Doctor, for the year 1995, if you know the

12 figure, what was Lorillard's approximate
13 market share?
14 A 1995? About 8 percent.
15 Q About 8 percent. And are you familiar with
16 the Surgeon General's statistics estimating
17 that about 400,000 people a year die from
18 diseases related to smoking? Is that a
19 number you're familiar with?
20 A Well, I've heard numbers that vary, I guess,
21 from 400 to 500.
22 Q Let's use the conservative number, 400,000.
23 If the Surgeon General is correct, and I
24 know you disagree with him, but if the
25 Surgeon General is correct, 400,000 people
5606
1 in 1995 died of smoking-related diseases and
2 Lorillard had 8 percent of the market, would
3 it follow then in your view that Lorillard
4 would be responsible for 8 percent of the
5 disease?
6 A No. That wouldn't follow in my mind.
7 Q All right. Would you expect that some of
8 the other companies' cigarettes might be
9 more harmful than yours and might cause more
10 of the disease?
11 A No. It doesn't -- it doesn't ring correct
12 with me to make that calculation in the
13 beginning. This calculation, which I'm
14 familiar with the techniques that are used,
15 don't even deal properly with the multitude
16 of confounders that are involved in trying
17 to make such a calculation. There are --
18 there are multitude of confounders that are
19 not considered when you try to apportion
20 statistically the number of deaths based
21 upon an epidemiological study, let alone the
22 validity of the epidemiological study as a
23 means of a basis for making those kind of
24 calculations.
25 Q I understand, sir, that you disagree with
5607
1 using epidemiological studies to prove
2 causation and you have some questions about
3 epidemiological studies. My question
4 though, to you, sir, is: Assuming the
5 surgeon general's figures are correct for
6 the purpose of my question, the 400,000
7 people died in 1995 from smoking, do you
8 agree that Lorillard, having 8 percent of
9 the market, is responsible for approximately
10 8 percent of that disease and death?
11 A No, I wouldn't -- I wouldn't agree under
12 that hypothetical at all. That they're
13 responsible for any of the deaths.
14 Q Okay. In your view, as you sit here today,
15 on July 24, 1997, Lorillard has never been
16 responsible for the death of any smoker; is
17 that right?
18 A Not to my knowledge, no.
19 Q Dr. Spears, how long have you been with
20 Lorillard?
21 A 37 years.
22 Q So you began in 1959 or '60?

23 A '59.
24 Q 1959. All right. And at some point you
25 headed up the research department at
5608
1 Lorillard; is that correct?
2 A That's correct.
3 Q When did you begin to do that?
4 A I became director of research and
5 development I believe in 1967 or '8.
6 Q So Dr. Spears, you've been in the cigarette
7 industry almost four decades; correct?
8 A Yes.
9 Q And you now head one of the major cigarette
10 companies in this country.
11 A That's correct.
12 Q All right. And your interest, I take it, is
13 to sell as many Lorillard cigarettes as
14 possible.
15 A That's one of the interests. Certainly to
16 take the competitor share of the market,
17 yes.
18 Q And you would be happy, Dr. Spears, wouldn't
19 you, if every adult American in this country
20 smoked?
21 A I don't know that that would make me happy
22 but if they did I wouldn't object.
23 Q All right. And if every adult American in
24 this country smoked Lorillard cigarettes,
25 that would certainly make you happy,
5609
1 wouldn't it?
2 A I don't think it has something to do with my
3 happiness. It has something to do,
4 certainly, with the success of the company,
5 yes.
6 Q And if the company is successful, you would
7 be happy, wouldn't you?
8 A I would be pleased with the results, yes.
9 Q All right. And you would certainly be
10 happier if Lorillard had a larger percentage
11 of the American cigarette market than it has
12 now, wouldn't you?
13 A That's one of our objectives.
14 Q All right. And Lorillard now is the number
15 four cigarette company in this country?
16 A That's correct.
17 Q And you'd like to be number one.
18 A We don't aspire to that, I don't think, but
19 that would certainly be a business success
20 if we were number one.
21 Q All right. Dr. Spears, are there any adults
22 in this country whom you think should not
23 smoke Lorillard cigarettes?
24 A There may be adults who shouldn't smoke any
25 cigarettes.
5610
1 Q All right. And tell me which adults or
2 which categories of adults you believe
3 should not be smoking.
4 A Any that their physicians have advised that
5 they shouldn't smoke.
6 Q All right.
7 A For medical reasons.

8 Q All right. Any other categories of adults
9 that you believe should not smoke?
10 A No, I'm not aware of any others.
11 Q How many cigarettes on average does
12 Lorillard sell in a year?
13 A Which year?
14 Q Well, let's take the last couple of years.
15 If the number has changed dramatically, tell
16 me.
17 A About 40 billion cigarettes.
18 Q 40 billion with a B?
19 A With a B.
20 Q Is that the sales of Lorillard cigarettes in
21 the United States or worldwide?
22 A United States. Lorillard has no business
23 outside of the United States.
24 Q Is there any category of adults whom
25 Lorillard --

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1 A Excuse me, I made a small error there. We
2 do sell to some possessions in Puerto Rico.
3 Q They're in the 40 billion number?
4 A They're in the 40 billion.
5 Q Okay. Is there any category of adults who
6 Lorillard has publicly cautioned not to
7 smoke?
8 A No.
9 Q Do you believe that smokers who develop lung
10 cancer should continue to smoke?
11 A I would follow the advice of the physician.
12 Q All right. And if the person received no
13 particular advice from his or her physician,
14 would it bother you if someone who had lung
15 cancer continued to smoke?
16 A I think it would be their choice.
17 Q So it wouldn't bother you?
18 A Be their choice.
19 Q If it's their choice, does that bother you?
20 A No.
21 Q You certainly wouldn't advise the person who
22 has lung cancer not to smoke, would you?
23 A I wouldn't provide advice in any direction.
24 Other than consult their physician.
25 Q First of all, Doctor, what is your present

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1 salary at Lorillard?
2 A Approximately 600 --
3 MR. OHLEMEYER: Excuse me, Your
4 Honor.
5 42, line 9.
6 Q Is Lorillard engaged in the practice of
7 giving free cigarettes to its employees?
8 A Yes, it does.
9 Q How does that program work at Lorillard?
10 A If an employee wants a pack of cigarettes
11 and they are present at the workplace, then
12 they can receive a pack of cigarettes for a
13 day of work and that is with respect to the
14 manufacturing operations and that facility.
15 Q All right. Dr. Spears, do you agree that
16 Lorillard as a company that sells billions
17 of cigarettes a year, that it has an
18 obligation to thoroughly test its cigarettes

19 to determine that they are safe to
20 consumers? Do you accept that obligation?
21 A We have accepted the obligation to continue
22 to evaluate our cigarettes, yes.
23 Q And as you sit here today, are you satisfied
24 based on whatever testing Lorillard has done
25 that Lorillard cigarettes are safe for

5613

1 consumers?
2 A Safe is an absolute term. I don't think I
3 could represent that cigarettes or anything
4 else is absolutely safe. I think that's --
5 that's not possible. It's not possible to
6 say it with really anything that you ingest
7 or the air you breathe or anything else.
8 So, no, I could not represent to anyone that
9 cigarettes are safe in that context.
10 Q All right. Dr. Spears, do you understand
11 that in this country consumers don't have an
12 obligation to test a product that they buy
13 in the mass market to determine if it's
14 safe, that they're entitled to rely on the
15 manufacturer? You accept that as a
16 proposition?

17 A Well, I think if they rely on the
18 manufacturer and they rely on information
19 that's on the package, yes.
20 Q Okay. Smokers couldn't test cigarettes for
21 safety anyway, could they?

22 A They could test -- I guess carry out some
23 sort of test for fire hazard.

24 Q Other than fire hazard, I'm talking about
25 health. Smokers couldn't test cigarettes

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1 for health, could they, even if they wanted
2 to?

3 A Generally, no.

4 Q And Doctor, do you accept as a correct
5 proposition that it's not the government's
6 obligation in this country to test a private
7 company's products to determine if they're
8 safe or not, that's the manufacturer's
9 obligation; do you accept that?

10 A Generally, yes.

11 Q All right. Dr. Spears, do you agree that
12 every major medical and scientific group in
13 this country, as well as every government
14 agency in this country which has looked at
15 the matter, has concluded that cigarette
16 smoking causes disease? Do you agree that
17 they have made that conclusion?

18 A As I recall, they've all made that kind of
19 statement, yes.

20 Q All right. And are you aware, sir, that the
21 tobacco companies are essentially standing
22 out there by themselves denying that the
23 case has been proven against cigarettes?
24 Are you aware you're sort of alone in that
25 view?

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1 A Well, when you say alone, I don't -- I don't
2 really subscribe to that. I think there are
3 certainly other individuals who have

4 conducted research in this field who would
5 not agree with it. And there aren't many
6 others left other than those who conducted
7 research and those who are in public health
8 or those that are associated with the
9 tobacco industry. In my judgment, there are
10 other individuals who have worked in this
11 area who are not going to speak out against
12 these kind of positions in the present
13 environment.

14 Q All right. To save some time, Doctor, I'm
15 going to ask you, would you list, give me
16 the names of just five scientists or
17 researchers who have not worked for the
18 tobacco companies or received tobacco
19 company money who have concluded that
20 smoking does not cause disease.

21 A Well, that was the point I'm just making. I
22 don't think there is anyone else. There's
23 no one else left. They're either part of
24 the public health service, they're part of
25 the group that is in the tobacco industry or

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1 has been funded by the tobacco industry.
2 There isn't anyone else to take a position
3 who has studied -- studied in the field and
4 would be qualified to do so otherwise.

5 Q So, so that I understand it, is it your
6 testimony, then, that when you put aside
7 scientists who have received money from the
8 tobacco companies, or worked for the tobacco
9 companies, that there's no one else who
10 agrees with your view that cigarette smoking
11 has not been proven to cause disease?

12 A Not quite my view. My view is that there's
13 no one else who is qualified to speak out or
14 would be willing to speak out against the
15 public health service, seeing that they
16 belong to one of those two groups. So the
17 only source of these individuals would be in
18 the public health services.

19 Q And the only source of individuals who agree
20 with your view would be in the tobacco
21 industry or funded by the tobacco industry;
22 is that right?

23 A I said that those are the two camps. I
24 mean, there isn't anyone else.

25 Q Now, what about Lorillard's statement. You
5617

1 stated here publicly that you do not believe
2 that smoking has been proven to cause lung
3 cancer. Is that a statement that you
4 believe is true and credible?

5 A Yes, I do.

6 Q Is that a statement that you believe the
7 public should rely on?

8 A I think that they should rely on that
9 statement, yes.

10 Q All right. Because you consider yourself to
11 be a credible individual, don't you,
12 Dr. Spears?

13 A I think so, yes.

14 Q And you consider your company to be a

15 credible company.
16 A I do.
17 Q And when your company makes public
18 statements such as it has not been proven
19 that smoking causes lung cancer, you believe
20 the public should rely on those statements
21 as true and credible, don't you?
22 A I believe that the statement that is being
23 made is correct based on the scientific
24 information that's available, yes.
25 Q And you believe that that's a statement that
5618
1 the public can rely on.
2 A If I'm making that statement, I believe they
3 should rely on it, yes.
4 Q All right. Does the Tobacco Institute take
5 the same position as the individual --
6 MR. PATRICK: Your Honor, at this
7 point, I believe Dr. Spears goes into
8 another area.
9 THE COURT: Might be a good time to
10 take a break. I just checked, they have
11 lunch ready anyway. So we'll take the noon
12 break. We'll start again at 1:00, ladies
13 and gentlemen. Actually, let's make it
14 1:15.
15 (Standard admonition)
16 (Jury not present)
17 THE COURT: All right. Jury is not
18 present. You're going to offer the Farone
19 deposition, Mr. Motley?
20 MR. MOTLEY: I'm going to check
21 with my people at lunch and see if we need
22 it. He's not a senior -- he's not a CEO or
23 anything like that, he was a senior
24 researcher but he's not head of R & D or
25 anything like that.
5619
1 THE COURT: I read it.
2 MR. MOTLEY: Do you want me to
3 commit now?
4 THE COURT: No. No. No. Not at
5 all.
6 MR. MOTLEY: May I file this with
7 Your Honor?
8 THE COURT: Yes, sir.
9 MR. MOTLEY: Judge, I assume
10 Mr. Wagner and I will have some time this
11 afternoon to debate these Huber exhibits.
12 THE COURT: Debate?
13 MR. MOTLEY: Huber. I wanted to
14 move them, I think he had something he
15 wanted to do himself.
16 MR. WAGNER: This is on the reading
17 of the Huber -- or publishing of the Huber
18 deposition, Your Honor.
19 THE COURT: All right.
20 MR. WAGNER: I'm advised that some
21 portions of that deposition were published
22 and read in that had been excluded. At page
23 45, line 6 to 13, line 18 to 25.
24 In fact I'll just read it with you,
25 Mr. Motley.

1 What it says is, Judge -- this is very
2 short.

3 "Let's stick with the research first.
4 Okay? What did Mr. Roemer tell you was the
5 reason, off the record, why your animal
6 studies weren't continued to be funded by
7 cigarette companies? Mr. Roemer of RJ
8 Reynolds.

9 "Answer: I think his intent was to
10 continue funding them, but he expressed
11 there was a bigger picture.

12 "Question: A bigger picture?

13 "Answer: A bigger picture.

14 "Question (By Mr. Motley): Did you
15 ever learn what that bigger picture was that
16 Mr. Roemer of RJ Reynolds described?

17 "Answer: Well, one of his colleagues
18 suggested that the bigger picture was to
19 maintain the status quo and to diversify the
20 industry."

21 I need to check a note here real quick.

22 And then question: "What was the --
23 who was this other person who told you that
24 it was to maintain the status quo and to
25 diversify the company?

1 "Mr. Hobbs."

2 We don't want to do anything about that
3 in terms of a limiting instruction to the
4 jury or anything, but merely to bring it to
5 the Court's attention in the event that the
6 plaintiffs attempt to use that testimony
7 that was excluded as a basis for introducing
8 some document.

9 MR. MOTLEY: Your Honor, we won't
10 do that. Your Honor, I apologize, we've
11 obviously had terrible problems with this
12 video, not these folks in the back, but the
13 local videographers, it's an embarrassment
14 to us that this is happening, the video has
15 not been clear at times. We should have
16 gone to Indianapolis, but we didn't. We
17 thought these people, they told us they
18 would do a good job.

19 I know, I've seen Mr. Patrick's marked
20 up copy and, clearly, he's delineated what
21 they were supposed to eliminate and they
22 clearly haven't done it pursuant to Your
23 Honor's ruling and the defendants'
24 designations and it's embarrassing to us and
25 I apologize.

1 MR. WAGNER: No apology needed.

2 MR. MOTLEY: We will make
3 absolutely no use of that for documents,
4 closing arguments or legal argument or any
5 other way.

6 THE COURT: When I heard that I
7 thought that was something I would sustain
8 the objection to.

9 MR. MOTLEY: I was hoping you would
10 overrule yourself, Your Honor, since it was

11 such good testimony, but that was an error
12 on the part --
13 THE COURT: That's happened a
14 couple times today. Plaintiffs are going to
15 have to review these before we play them in
16 front of the jury. I don't know any other
17 way to do it.
18 MR. PATRICK: We have an associate
19 that was supposed to review them, Your
20 Honor, I apologize.
21 As far as Farone is concerned, I'm
22 going to advise Mr. Motley right now we
23 ought to shorten up our case, these
24 depositions are about to cause me to have a
25 stroke, so -- he doesn't want that to

5623

1 happen.
2 THE COURT: I don't need an answer
3 now but let me know. After Mr. Motley gets
4 with his people, maybe his people can get
5 with my people and tell me.
6 MR. MOTLEY: No, sir, I'll give you
7 an answer.
8 (A lunch recess was taken.)
9 MR. CASSELL: All rise.
10 THE COURT: Be seated. All right.
11 The jury back in its entirety, together with
12 three alternates. We are in the midst of
13 the Spears deposition. You may continue.
14 MR. PATRICK: Thank you.

15 (Video resumed)
16 Q Did the Tobacco Institute take the same
17 position that the individual cigarette
18 companies take concerning whether smoking
19 has been proven to cause disease?
20 A I think it takes a position that's
21 consistent with the use of the majority of
22 members anyway.
23 Q And you regard the Tobacco Institute as a
24 credible organization?
25 A I do.

5624

1 Q If the Tobacco Institute states that it has
2 not been proven that smoking causes lung
3 cancer, for instance, you believe that
4 that's a statement that should be relied
5 upon by legislators who hear that statement;
6 is that right?
7 A Yes, I would.
8 Q Doctor, do you want to take a minute?
9 A I'm okay.
10 Q Dr. Spears, can you think of any reason why
11 the public should not accept Lorillard's
12 position as credible that smoking has not
13 been proven to cause disease?
14 A Well, the position is not quite that. I
15 mean, it may or may not cause disease. But
16 I think that's quite a credible position,
17 yes.
18 Q Let me restate and be sure I have the
19 position right. Is it Lorillard's position
20 that smoking has not been proven to cause
21 disease?

22 A That's correct.
 23 Q All right. And is that a position that the
 24 public should be entitled to rely upon as a
 25 credible position?
 5625

1 A I think so.
 2 Q And is that a position that the public
 3 should be entitled to act upon as a credible
 4 position?
 5 A I believe so.
 6 Q Okay. And people who buy Lorillard's
 7 cigarettes and smoke them are doing exactly
 8 what your company wants them to do; isn't
 9 that right?
 10 A Well, we want -- if they're going to smoke,
 11 we want them to purchase Lorillard's
 12 cigarettes, yes.
 13 Q And first of all, you want people to smoke
 14 or you'll have no market?
 15 A Well, I think that's their choice. I mean,
 16 we're not trying to influence whether they
 17 do or do not smoke.
 18 Q But I'm asking you Lorillard, Lorillard
 19 wants people to smoke, doesn't it?
 20 A Well, if there were no smokers, obviously,
 21 Lorillard wouldn't be in this business.
 22 Q All right. So Lorillard wants people to
 23 smoke so it can have a market; that's fair,
 24 isn't it?
 25 A It's somewhat fair. It's not quite what I
 5626

1 would say. I think Lorillard is not trying
 2 to cause people to smoke. That's not part
 3 of our strategy, never has been. But if
 4 they choose to smoke, then we would like
 5 them to choose Lorillard brands.
 6 Q But if nobody starts smoking, your market
 7 will die out, won't it?
 8 A And if it dies out, we would have to move
 9 away from this business, yes.
 10 Q All right. Has Lorillard taken any steps to
 11 move away from the tobacco business?
 12 A Not Lorillard, no.
 13 Q So you're expecting that new smokers will
 14 take up smoking and your market will be
 15 maintained, aren't you?
 16 A Well, we don't know. But if they move away
 17 and people stop smoking, then obviously
 18 we'll have to find another business to
 19 operate by.
 20 Q And you and Lorillard want consumers to buy
 21 Lorillard cigarettes, smoke those
 22 cigarettes, and then go out and buy another
 23 pack of Lorillard cigarettes; isn't that
 24 right?
 25 A If they're going to smoke, yes.
 5627

1 Q And when they do that, they're doing exactly
 2 what you want them to do.
 3 A That's what we would like them to do if
 4 they're going to be smokers.
 5 Q All right. Doctor, is it your view that
 6 epidemiological studies can not prove

7 causation no matter what the relative risk
8 is from the study?
9 A No.
10 Q All right. At what level can an
11 epidemiological study prove causation, in
12 your view?
13 A It can prove causation if you can preclude
14 the possibility of confounders, and that is
15 most likely when you have the disease
16 following close on the -- close to the
17 exposure, timewise, in terms of time.
18 Epidemiological studies, for example, can
19 demonstrate a viral agent, if the viral
20 agent is identified, and show the
21 relationship between the viral agent and the
22 disease when the disease occurs frequently
23 right after the viral agent.
24 I think studies -- epidemiological
25 studies in the workplace, one that I recall
5628
1 is chloromethyl ether which causes a
2 unique -- somewhat unique lung tumor.
3 Incidents followed closely or not too far
4 after the exposure of workers to
5 chloromethyl ether. In those instances, I
6 believe the epidemiological studies can be
7 relied upon as showing a cause.
8 Q All right. Let's talk about cigarette
9 smoke. Is it your view that epidemiological
10 studies can ever prove cause and effect with
11 respect to cigarette smoking and disease
12 such as lung cancer?
13 A Epidemiological studies alone? No.
14 Q Okay. So epidemiological studies won't do
15 it in Dr. Spears view; is that right?
16 A That's correct.
17 Q Okay. Dr. Spears, when you came to
18 Lorillard in 1959, was Lorillard already
19 studying the issue of tobacco smoke and
20 health effects?
21 A They were beginning some -- well, they had
22 done analytical work, and they were doing
23 some fractionation of cigarette smoke
24 particulate, and they were I guess providing
25 some materials to some of the investigators
5629
1 who were doing skin painting.
2 Q And ballpark, around that time how many
3 cigarettes was Lorillard selling?
4 A 56, 60 billion. 50.
5 Q 50 or 60 billion?
6 A I think so, yes.
7 Q Has the --
8 A We're talking about early 1960s?
9 Q Yes.
10 A Yeah.
11 Q During your 37-year career, has the number
12 hovered between 40 and 60 billion cigarettes
13 sold by Lorillard a year?
14 A No. It was a little lower than that at
15 times. It got down to maybe 35 billion.
16 Q But the number has ranged between 35 to 60
17 billion cigarettes per year for each of the

18 37 years you've been with Lorillard?
19 A It may have been a little higher than 60,
20 65.
21 Q And for each of those 37 years, has
22 Lorillard either done research or sponsored
23 research somewhere concerning tobacco and
24 health?
25 A Each of the 35 years? It depends upon how
5630
1 you define smoking and health, but I would
2 say yes.
3 Q All right. And after those 37 years of
4 sponsoring research, to the extent Lorillard
5 has done, as we sit here today, it is your
6 testimony that we still do not know that
7 cigarette smoking causes lung cancer; is
8 that right?
9 A That's my conclusion. We certainly know a
10 lot more today than we knew 35 or 37 years
11 ago.
12 Q But we don't have the proof, in your view?
13 A We do not.
14 Q And I take it, then, that in your view,
15 filter cigarettes are no safer than
16 unfiltered cigarettes; is that right?
17 A That's correct.
18 Q So if someone were to smoke the highest tar
19 unfiltered cigarette in the American market
20 today, whatever that may be, in your view
21 they're doing nothing any more dangerous
22 than if somebody smokes the lowest tar
23 filtered cigarette?
24 A That's correct.
25 Q Does Lorillard make unfiltered cigarettes
5631
1 still?
2 A Yes, we do.
3 Q Has Lorillard ever taken a cigarette off the
4 market because of health concerns?
5 A No.
6 Q Do you have any plans to do so?
7 A Not today, no.
8 Q All right. Let's say the government says
9 we're getting out of the tobacco
10 interference business, we're just going to
11 let the tobacco companies do whatever they
12 want to do about warnings and you don't have
13 to have them on the package anymore by law.
14 But the science stays the same. Would you
15 keep warnings on packs or take them off?
16 A I would put the warnings on that I talked
17 about earlier from my perspective which --
18 Q What warnings would they be?
19 A I would leave this warning on, but with the
20 may or possibility.
21 Q How would the warning read as Dr. Spears
22 would want it to be on the package?
23 A Smoking may cause lung cancer, heart
24 disease, emphysema, and may complicate
25 pregnancy.
5632
1 Q All right. And do you believe that to be a
2 true statement?

3 A I do, based on the information that I have
4 today.
5 Q Okay. Dr. Spears, do you believe that
6 parents of newborns, who bring the newborns
7 home, should smoke in the home around a
8 newborn?
9 A I don't think I would hold the child up
10 close to me and smoke.
11 Q How about smoking in the nursery where the
12 child is sleeping?
13 A I wouldn't be concerned.
14 Q You wouldn't be concerned about that?
15 A No.
16 Q Let me --
17 A I'm concerned about very new children with
18 respect to anything, but I'm not aware of
19 any significant concentrations of
20 environmental tobacco smoke that you would
21 produce unless you sat in there and
22 purposely did something, you know, smoked --
23 sit in there and smoked cigarettes all day
24 long or something like that.
25 Q How about smoking in the car?

5633

1 A Any reasonable behavior I don't think is of
2 concern.
3 Q How about smoking in the car while taking
4 the newborn down for the two-week checkup?
5 Would that be a concern to you?
6 A Smoking how much? Are the windows rolled
7 up?
8 Q The windows are rolled up, the air
9 conditions is on and you're smoking in the
10 driver's seat.
11 A Wouldn't bother me to smoke a cigarette in
12 the car.
13 Q Prior to the late '70s or early '80s, what
14 testing did Lorillard do on its additives
15 before they were put into Lorillard
16 cigarettes?
17 A Literature reviews and relied upon other
18 information produced as to whether they were
19 acceptable as food additives or generally
20 regarded as satisfactory additives in the
21 FEMA list, flavor and extract manufacturers.
22 There are also general assertion of the
23 literature for all -- literature that may
24 exist on any particular additive.
25 Q But other than the literature search or

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1 relying on the FEMA list, did Lorillard do
2 any testing itself of the additives?
3 A No.
4 Q Now, the FEMA list, is that the list that's
5 called the GRAS list, G-R-A-S?
6 A Yes.
7 Q Stands for "generally regarded as safe"?
8 A Yes.
9 Q Have you ever read one of those lists?
10 A Yes.
11 Q And does the list caution that the GRAS
12 listing is only for the uses listed in the
13 list?

14 A Yes, generally.
15 Q All right. And there is no use that's ever
16 been listed in any of the GRAS lists for
17 burning tobacco products, is there?
18 A No.
19 Q But Lorillard relied on the GRAS list.
20 A And our knowledge as to whether these
21 compounds were being pyrolyzed or whether
22 they were being distilled over intact, so
23 yes, there is other information relied on.
24 When you look at all of the information plus
25 your understanding of the mechanisms that

5635

1 are operative in the smoldering cigarette.
2 Q Is Lorillard a member of FEMA?
3 A Yes, we are.
4 Q Did Lorillard ever receive --
5 MR. PATRICK: Your Honor, at this
6 point the audio quality becomes very
7 difficult to hear. We're going to read some
8 portion of the deposition and then the tape
9 will pick back up and the clarity will be
10 better.

11 THE COURT: All right.

12 MR. PATRICK: So Mr. Riley is going
13 to read the answers at this point. And we
14 will begin on page 101 of the deposition at
15 line 20.

16 Q Dr. Spears, I would like to ask you, can you
17 tell me, is there any number of cigarettes
18 smoked by a person that you would agree
19 would cause disease, any number of
20 cigarettes?
21 A Any number of cigarettes? That's a
22 difficult question. I think you could
23 probably kill yourself if you smoked 24
24 hours a day one cigarette after the other.
25 Q How would you kill yourself doing that?

5636

1 A You would probably asphyxiate yourself.
2 Q From the carbon monoxide in cigarettes?
3 A And/or nicotine, yes.
4 Q And other than that, other than 24 hours a
5 day, is there any dose of cigarettes, number
6 of cigarettes smoked per day, that you would
7 agree would cause disease?
8 A No.
9 Q Dr. Spears, is benzo(a)pyrene a contact
10 carcinogen?
11 A I'm not sure I know what you mean by
12 contact.
13 Q Does it have an effect in the lung when it
14 comes in contact with the lung?
15 A If it's instilled into the lung, yes.
16 Q What effect does it have?
17 A Produces tumors in the lung.
18 Q Dr. Spears, until a point recently the
19 American Tobacco industry was united in
20 denying that cigarette smoke caused disease.
21 Is that true? All the companies were agreed
22 upon that?
23 A I don't think there is any agreement among
24 the companies on that statement. Each

25 company is making their individual
5637
1 statements.
2 Q All right. Are you aware of any American
3 Tobacco Company that as of two years ago was
4 stating, "We agree that cigarette smoke
5 causes lung cancer"?
6 A No, I'm not.
7 Q Now, recently one of the American Tobacco
8 Companies has broken ranks with the industry
9 and now admits that cigarette smoke causes
10 lung cancer. Are you familiar with that?
11 A I'm familiar with one company that has taken
12 a different position, yes.
13 Q All right. And that was a company that
14 until recently took the same position as
15 Lorillard on these issues.
16 A Yes. But I would have referred to it as
17 broken ranks. There was no agreement among
18 the companies that they would all make the
19 same statement.
20 Q Now, the company that has now announced that
21 it agrees that cigarette causes disease is
22 the Liggett Group; correct?
23 A That's what I read in the newspaper, yes.
24 Q Dr. Spears, did Lorillard report a profit
25 for last year?

5638

1 A Yes.
2 Q And what was that profit, sir?
3 A Well, Lorillard reports as part of Lowes,
4 and I don't remember the exact number, but
5 on the order of 350 million after tax.
6 Q Okay. Was the 350 million after tax the
7 Lorillard profit or the entire Lowes
8 Corporation profit?
9 A It's Lorillard's contribution to Lowes
10 Corporation profit.
11 Q Let's mark as next an October 10, 1968 memo
12 from Mr. Hudson to Mr. Tucker.
13 Dr. Spears, were you copied on that
14 memo?
15 MR. OHLEMEYER: Excuse me, where
16 are you, page and line?
17 MR. PATRICK: Page 155, line 15 is
18 where I started.
19 MR. OHLEMEYER: Okay.
20 A Yes.
21 Q And who was the author, Mr. Hudson?
22 A He was the BS chemist, as I recall, in the
23 Product Development Department.
24 Q And who was Mr. Tucker, the principal
25 recipient?

5639

1 A I'm not sure at this time whether he was
2 director of product development, but he may
3 have been at this time.
4 Q The title of the memo is "Possible Reduction
5 of Carcinogens in Tobacco Smoke Condensate
6 by Enzymatic Treatment of Tobacco in the
7 Hogshead." Is that right?
8 A That's what it says.
9 Q Do you know which of the carcinogens in the

10 tobacco smoke Mr. Hudson was proposing could
11 be reduced by this treatment?
12 A By the last statement in the memo, the last
13 paragraph, I would say he was simply
14 referring to skin painting.
15 Q And he talks on the second page about "some
16 new insight may be obtained which may help
17 solve the problem of carcinogenicity
18 sooner."
19 Do you see that at the top of page 2?
20 A Yes, I do.
21 Q What is the problem of carcinogenicity that
22 was of concern in 1968 to Lorillard?
23 A The only one that I'm aware of is skin
24 painting. This appears to be simply an idea
25 that this particular scientist was floating
5640
1 with his supervisor.
2 Q All right. And copied to you?
3 A And copied to me.
4 Q All right. And as we sit here today,
5 Dr. Spears, has Lorillard solved the problem
6 of carcinogenicity in cigarettes?
7 A On mouse skin, no.
8 Q Has it solved the problem of carcinogenicity
9 in humans?
10 A I don't believe there is a problem in humans
11 as we discussed before.
12 Q Let's take a look next at a March 4, 1975
13 memo from Mr. Larson to Mr. Louis.
14 Dr. Spears, do you know who Mr. Larson was
15 at Lorillard in 1975?
16 A Yes. I believe he was a chemist, again in
17 the product development area.
18 Q All right. And who was Dr. C.I. Louis at
19 Lorillard in 1975?
20 A He was a chemist.
21 Q And the chemist, Mr. Larson, is writing
22 about some suggested alterations of
23 cigarettes, is he not?
24 A Specifically a nicotine-free cigarette.
25 Q Which he says will do a number of good
5641
1 things. Also "would be a big step forward
2 in reducing the health hazard of smoking."
3 Do you see that?
4 A I see that.
5 Q Now, he doesn't talk about the alleged
6 health hazard of smoking. He talks about
7 reducing the health hazard of smoking;
8 doesn't he?
9 A That's what the statement is, yes.
10 Q Would you agree with that statement as
11 written?
12 A No, I wouldn't.
13 Q If someone within Lorillard says that
14 smoking is a health hazard, you think that's
15 a bad idea to say that, don't you?
16 A No, I don't know if it's a bad idea to say
17 it if they're expressing their view.
18 Q Are there individuals working within
19 Lorillard today who sincerely believe that
20 smoking is a health hazard?

21 A I don't know.
22 Q Do you know of anybody who does?
23 A No, I don't.
24 Q Certainly no one has ever expressed that
25 view to you who is still working at
5642
1 Lorillard, have they?
2 A No one who has worked for Lorillard in the
3 past or today has expressed that view that I
4 can recall.
5 Q Let's mark as next a June 23, 1976 memo from
6 Dick Smith to a number of individuals,
7 including Mr. Ave, A-V-E.
8 Doctor, this is a long memo and I've
9 highlighted some pages and I've also tabbed
10 them so that you can find my references but
11 feel free to review the whole document if
12 you need to.
13 A Okay.
14 Q Dr. Spears, do you recall participating in
15 the Synectics -- is that the way to say it?
16 Synectics --
17 A That's correct.
18 Q -- Problem Laboratory?
19 A Yes, I do.
20 Q All right. What do you recall the Problem
21 Laboratory being?
22 A I recall it being a procedure which was
23 developed by an organization called
24 Synectics which housed in Cambridge,
25 Massachusetts, an offshoot, I believe, of
5643
1 MIT, some people who started this. And it
2 represented a creative way of looking at
3 problems, trying to find solutions, where
4 you divide the activity up between client
5 and other participants. And the client is
6 supposed to indicate that the group is on a
7 reasonable track in terms of the kind of
8 things that they're saying relative to a
9 solution or disagreeing and telling them to
10 go in another direction.
11 And there's also a facilitator in the
12 meeting whose purpose is to try to get
13 people to think without any inhibitions,
14 restrictions, regard to the practicality or
15 doability of anything and spend time trying
16 to find some approaches that may be creative
17 to different kinds of problems. And then if
18 you can, to develop some next steps and go
19 forward in the future.
20 Q And so did you spend a couple of days with
21 these folks from Synectics going through the
22 exercise?
23 A Yes. We spent some time learning the
24 process, through doing some, I guess,
25 training with the group.
5644
1 Q Okay.
2 A And then there was subsequent sessions
3 which, I guess, are recorded here.
4 Q All right. If we can, let's look at a
5 couple of the sessions. Let's look at

6 Session 5, which is tabbed, which indicates
7 that Alex was the client.
8 A Yes.
9 Q Alex would be you?
10 A I believe so.
11 Q That would be a session at which you would
12 keep the discussion sort of on track, so to
13 speak?
14 A Or try to identify whether or not they
15 should keep working on this or give it up.
16 Q All right. And then there is a statement
17 that says, "Identify 15 areas of potential
18 consumer need that can be fulfilled by
19 tobacco products, particularly cigarettes.
20 Include chewing tobacco and exclude cigars."
21 Then there's a list of items underneath
22 that; correct?
23 A These are just things that the group thought
24 out, bam, bam, bam, bam.
25 Q All right. Let's look at some of the things
5645
1 threw out. No. 2 is "How to relieve health
2 pressures or take advantage of them."
3 A Somebody threw that out.
4 Q And by relieving health pressures, they mean
5 the health pressures on cigarettes?
6 A I don't know what they mean other than
7 what's here.
8 Q Someone else said, "I wish we could deliver
9 nicotine positives without any of the
10 'baddies' into, and then closed quote, and
11 then the rest is cut off. What are the
12 baddies that would be referred to?
13 A I can't answer beyond what it says.
14 Q Okay. How about No. 9, somebody in the
15 group says, "How to make smoking so
16 desirable that people keep on despite health
17 pressures" and then in parenthesis, hair
18 back on my head, closed parenthesis."
19 Do you remember the discussion of
20 trying to make smoking so desirable that
21 people could keep on smoking despite the
22 health pressures?
23 A No. As I say, these were just -- these are
24 kind of instant responses or things that
25 come from people in a rapid-fire manner, and
5646
1 they put them up on all kinds of pads on the
2 wall so they're posted all around the room
3 and you spend so many minutes doing this.
4 There is no evaluation of what people mean.
5 It's just throw out the ideas, and then you
6 try and look at this and decide you are or
7 are not going to work on any of them.
8 Q Somebody in the group wanted to talk about
9 how to make smoking so desirable that people
10 would keep on despite the health pressures?
11 A Somebody threw that idea out, yes.
12 Q Was that you?
13 A No. I wouldn't have thrown anything out. I
14 was the client.
15 Q Did you ever do this again, Dr. Spears?
16 A The Synectics?

17 Q Yes.
18 A We used the Syntectics approach to look at a
19 variety of problems within our own
20 organization. And we taught the method or
21 had people learn the method and come back
22 and operate as facilitators for general
23 problem-solving. So in the sense we used
24 it. I do not recall an occurrence where it
25 was used again for kind of marketing

5647

1 approaches.

2 Q Take a look at the very last page where
3 there is a summary of the ideas in the areas
4 that have been selected "selected during the
5 sessions for further consideration and
6 development."

7 Do you see that there, sir?

8 A I do.

9 Q Individual Choices. So everybody went
10 around the room and gave their individual
11 choices of ideas that should be followed up
12 for further consideration; correct? At
13 least that's what it says happened.

14 A Yes.

15 Q You're listed in there "Alex"; right?

16 A Uh-huh.

17 Q All right. Let's look at another one you
18 thought was the best. "How to relieve
19 health pressure or take advantage." That's
20 what you thought was one of the best things
21 that Lorillard could follow up on; correct?

22 A That's correct.

23 Q And if you could, I would like to either
24 relieve the health pressure on cigarettes or
25 take advantage of the health pressure on

5648

1 cigarettes in some way in your marketing.

2 That's what you wanted to do?

3 A That's what it says.

4 Q And you're not testifying that they recorded
5 incorrectly what you said, are you?

6 A Oh, I have no idea. If you understood the
7 process, you would understand why I say I
8 have no idea. It's rapid-fire, no
9 inhibitions, make your choices instantly so
10 we can move on. At the end of the day, you
11 try to decide whether you had really
12 accomplished anything. I think this whole
13 thing pretty much -- that we had not
14 accomplished anything.

15 Q You certainly, when you were making these
16 statements without any inhibitions, you
17 certainly didn't expect to be asked about
18 them some 23 years later in a deposition,
19 did you?

20 A Of course not.

21 Q Dr. Spears, over some period of time, did
22 your company ever -- did your company look
23 into the question of whether you could
24 manipulate nicotine in cigarettes to a given
25 level of nicotine as tar levels varied? Did

5649

1 you investigate that?

2 A Did we investigate moving nicotine
3 independently of tar; is that your question?
4 Q Yes.
5 A Yes, we had a research program in that area
6 at one time.
7 Q All right. Was that research program a high
8 priority within Lorillard?
9 A At the time it was given priority, yes.
10 Q Did you ever conclude, Dr. Spears, that it
11 was possible to manipulate the nicotine
12 yield by a factor of 40-fold?
13 A 40-fold?
14 Q Yes.
15 A I don't know. But if you have some
16 reference, I'll look at it.
17 Q I have one. Let's look at it and see if I'm
18 interpreting it correctly. Let's mark next
19 a 1975 Symposium on Nicotine and Carbon
20 Monoxide, dated November 17-18, 1975 next.
21 Dr. Spears, directing your attention to
22 the page that's marked page 13, which
23 contains -- which is in the article by you
24 on Factors Affecting Smoke Delivery of
25 Nicotine and Carbon Monoxide. Do you see
5650
1 the portion I've highlighted where you wrote
2 it was possible to manipulate the yield of
3 nicotine from about .1 milligram to 4
4 milligrams to -- per cigarette?
5 A Yes.
6 Q Would that -- would that with a 40 time
7 increase -- 40-fold increase in nicotine
8 yield?
9 A The difference between .1 and 4 is 40, yes.
10 Q All right. Ways to affect nicotine in
11 cigarette would be, I guess the easiest way
12 would be to add some nicotine to the
13 tobacco; right?
14 A Correct.
15 Q Spray it on somehow?
16 A No, there was none of that.
17 Q Could you also affect the nicotine delivered
18 in a cigarette or the form in which it's
19 delivered by altering the pH of the smoke?
20 A Obviously, you can affect the form by
21 altering the pH of smoke, if we mean salt
22 versus base, but it doesn't affect the
23 transfer or percentage of nicotine that
24 transfers by altering the smoke pH.
25 Q Does it affect the form in which the
5651
1 nicotine transfers?
2 A I just said that it did, as a salt or base.
3 Not all nicotine, but a small part of it.
4 Q Are you familiar with the term "freebase"?
5 A That's what I meant by base, yes.
6 Q What does freebase mean?
7 A Well, it means it's not a salt. In other
8 words, if you take a base, an acid, you
9 react the two, you get a salt and let the
10 two react. If you do not have the presence
11 of the acid, then you have a base as a
12 freebase.

13 Q Are you familiar -- and are you familiar
14 with the terms protonated and unprotonated?
15 A Same thing.
16 Q What does protonated mean?
17 A Protonated means it is the salt form.
18 Q Unprotonated?
19 A Means it's the base form, freebase form.
20 Q Is there a few in Lorillard that one or the
21 other forms of nicotine has a more
22 significant impact, as the term is used, on
23 a smoker?
24 A There's a few that nicotine in the freebase
25 form is absorbed to a greater degree in the
5652
1 upper respiratory tract, particularly in the
2 area of the throat, and you get kind of a
3 pungent sensation, pungency sensation that's
4 referred to as strength or impact. And yes,
5 we believe that within limits that the pH of
6 the smoke can affect the impact.
7 Q Did Lorillard ever take any steps in its
8 commercial cigarettes to alter the pH of its
9 smoke so that there would be more freebase
10 nicotine available in the smoke?
11 A No.
12 Q Did Lorillard ever take any steps in its
13 commercial production of cigarettes to
14 ensure in any way that there would be more
15 freebase nicotine delivered to the smoker?
16 A Well, I don't want to be confusing here.
17 But the tobacco blend has a role on how much
18 nicotine is free and how much is protonated.
19 Q Other than blending the tobacco.
20 A No.
21 Q Were you in charge of the nicotine
22 augmentation project at Lorillard?
23 A No. I was a senior vice president at the
24 time. I was not working in the laboratory.
25 Q Who was in charge?
5653
1 A Well, the hierarchy of the laboratory at
2 that time would have been the vice president
3 for research, would have been the director
4 of research, and the individual scientists.
5 Q All right. When Lorillard was working on
6 its nicotine augmentation project, I
7 understand your testimony is it never got
8 out of -- never got into commercial
9 production. But while you were working on
10 the project, what were the steps that
11 Lorillard took to augment the nicotine in
12 the cigarettes that were being developed?
13 A I'm not sure I can recall the steps, but as
14 I recall, Lorillard investigated the
15 transfer of nicotine from tobacco to the
16 smoke and what might influence the transfer.
17 And this was some of the normal construction
18 variables, including the paper, cigarette
19 paper. We investigated whether or not if
20 you put -- move the nicotine to the outer
21 periphery of the cigarette as to whether you
22 would get greater transfer. We looked at
23 adding nicotine in various forms to the

24 tobacco. Those are the things that I recall
25 at the moment.

5654

1 Q Dr. Spears --

2 A We looked at treating filters to make them
3 less effective for nicotine, whereas they
4 would remain effective for the tar.

5 Q And as I understand your testimony,
6 Dr. Spears, the reason Lorillard did not
7 market the nicotine-enhanced cigarette was
8 because of a taste problem with it.

9 A I think the observation was if you took a
10 three milligram tar cigarette and increased
11 the nicotine, that it was an irritating,
12 unacceptable cigarette smoke. Therefore, we
13 gave up the idea of trying to augment these
14 low tar cigarettes with nicotine as a
15 procedure for potentially making them more
16 acceptable.

17 Q Is it your testimony, Dr. Spears, that there
18 is no scientific proof that nicotine is
19 addictive?

20 MR. RILEY: Can I ask what page you
21 just went to?

22 MR. PATRICK: Page 187.

23 A Well, again, it depends upon your definition
24 of addicting. It's obviously an important
25 component of tobacco smoke. I don't think

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1 there is any doubt about that. It is an
2 important flavor component. It's an
3 important component as far as oral
4 sensations, upper respiratory tract
5 sensations. And smoking itself has been
6 indicated to -- some people, they feel
7 relaxed, or they feel aroused, but certainly
8 no sensation that I would relate to what I
9 would call addictive drugs. There is no
10 grand euphoria here as you would with heroin
11 or some of these kinds of drugs that I would
12 regard as truly addictive. There is no
13 intoxication. So no, I don't think of
14 nicotine as addictive in a classic sense. I
15 believe it plays an important role in
16 smoking.

17 Q Do you believe it plays an important role in
18 habituating smokers?

19 A I just explained I don't know. I don't
20 think the case is that clear.

21 Q What is the taste of nicotine?

22 A What is the taste? If you ever smoked a
23 cigarette with and without nicotine, you
24 would understand the difference. But
25 it's -- smokers describe it as having a lot

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1 of body in the oral cavity when they take
2 the smoke. It's a kind of a full flavor
3 sensation. Certainly the impact that we
4 talked about either is due to nicotine in
5 the throat, feeling of strength, feeling of
6 something of -- I don't know how to describe
7 it, but a general feeling of full flavor as
8 opposed to a very dilute kind of sensation

9 in your mouth.
10 Q Dr. Spears, if you -- if Lorillard either
11 voluntarily or through some compulsion takes
12 nicotine out of cigarettes, do you think
13 people will continue to smoke?
14 A I don't know, but I would doubt it.
15 Q Dr. Spears, let's look next at a July 16,
16 1976 memo from Mr. Ireland to
17 Dr. Minnemeyer.
18 Doctor, have you read the memo?
19 MR. PATRICK: I'm sorry. I need to
20 check one thing.
21 MR. RILEY: Okay.
22 MR. PATRICK: We should read like,
23 looks like to the bottom of the page.
24 MR. RILEY: Of 189?
25 MR. PATRICK: I believe, yes.

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1 MR. RILEY: Okay.
2 A I have.
3 Q In 1976, who was M.S. Ireland?
4 A She was an analytical chemist.
5 Q Analytical chemist?
6 A Yes.
7 Q Who was Dr. Minnemeyer in the company?
8 A He was the director of research I believe at
9 the time.
10 Q Before I handed you this document, had you
11 seen this document before?
12 A I don't think so.
13 Q All right. In this document Ms. Ireland
14 states, "Cigarette sales are made for one
15 reason. The customer is satisfied with the
16 product either for the taste or the
17 physiological satisfaction delivered from
18 the smoke. The consensus of opinion derived
19 from a review of the literature on the
20 subject indicates the most probable reason
21 for the addictive properties of the smoke is
22 the nicotine."
23 Did I read that correctly?
24 A Yes, you did.
25 Q Would you agree with your researcher,

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1 Ms. Ireland, the most probable reason for
2 the addictive properties of the smoke is the
3 nicotine?
4 A No. I thought I just covered that. First
5 of all, I don't know what she means by
6 addictive. But I gave you my definition of
7 addictive. And I also told you of some more
8 recent experiments that would suggest that
9 nicotine is not the reason that these people
10 experience what they call withdrawal.
11 MR. PATRICK: Your Honor, at this
12 point I believe the tape is clear to
13 understand, so I think we're going to go
14 again to the tape at this point.
15 MR. OHLEMEYER: Where does it pick
16 up?
17 MR. PATRICK: Picks up at page 193,
18 line 3.
19 Q As you sit here today, are you aware of any

20 misrepresentations, false statements, or
21 concealment of material facts by Lorillard
22 or anyone acting on Lorillard's behalf
23 regarding issues of smoking and health?
24 A I'm not aware of any.
25 Q Are you aware of any joint efforts by
5659
1 Lorillard and any other tobacco company to
2 misrepresent or conceal material facts
3 regarding smoking and health matters?
4 A No, I'm not.
5 Q Let's look at an August 17, 1960 letter from
6 A.W. Spears to a John Howell, what we'll
7 mark as Spears next.
8 A Okay.
9 Q Dr. Spears, does this letter reflect that
10 you had sent an abstract of a paper to be
11 presented at a Tobacco Chemist Conference?
12 A It does.
13 Q And does it reflect that you then wrote to
14 Professor Howell, "It has been recently
15 decided in the interest of the company and
16 the tobacco industry that a paper dealing
17 with compounds which are controversial in
18 the health aspects of smoking should not be
19 presented. It is, therefore, requested that
20 the committee does not consider the paper
21 for presentation at the conference."
22 Did you write that?
23 A I, quite frankly, don't remember it. The
24 paper was published.
25 Q But did you write Professor Howell and ask
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1 that the paper not be presented at this
2 conference because it could be detrimental
3 to the industry?
4 A That's what this says, yes.
5 Q That's a letter that you wrote?
6 A That's a letter that I wrote. I'm also
7 pointing out to you that this was published
8 as part of my curriculum vitae.
9 Q Why did you write this letter?
10 A I don't remember.
11 Q Who told you to write it?
12 A I don't remember that either.
13 Q Were you offended that someone within the
14 company asked you to pull a scientific paper
15 that you had prepared because it could be
16 detrimental to Lorillard?
17 A I don't remember anyone saying that. This,
18 of course, was when I was with the company
19 for a very short period of time.
20 Q You certainly were not in a position to buck
21 a superior who told you to pull a paper,
22 were you?
23 A I would not have been at that time.
24 Q And the paper concerned phenol, didn't it?
25 A That's correct.
5661
1 Q And phenol is a substance that's alleged to
2 be harmful in tobacco smoke, wasn't it?
3 A It was at one time.
4 Q And is phenol a substance that Lorillard

5 tried to selectively filter out of
6 cigarettes because of its alleged harm?
7 A We did and we published all of this work.
8 Q You don't remember who it was who told you
9 as a young research chemist to pull your
10 paper?
11 A I do not.
12 Q Did you know a Robert Seligman?
13 A Yes.
14 Q Mr. Seligman or Dr. Seligman still alive?
15 A I don't know.
16 Q Do you recall getting a letter from
17 Dr. Seligman in 1980 suggesting certain
18 subjects of research that the tobacco
19 industry should avoid?
20 A Yes, I do.
21 Q Let's mark that as next, March 31, 1980,
22 from Robert Seligman to Alex Spears.
23 Dr. Spears, you've seen this letter
24 before recently, haven't you?
25 A I've seen it before. I don't know how
5662
1 recently.
2 Q Was Dr. Seligman your counterpart at Philip
3 Morris?
4 A I believe at the time he was -- well, it
5 says vice president for research and
6 development. And at the time I would have
7 been, I guess, maybe an executive vice
8 president.
9 Q So we have physically two of the top
10 research men in two of the American tobacco
11 companies talking to each other about
12 research projects.
13 A Well, I had more responsibilities than just
14 research at this time.
15 Q Fine. And Dr. Seligman was writing to you
16 with topics that he thought, on behalf of
17 Philip Morris, the tobacco industry should
18 explore, and then also topics that should be
19 avoided; correct?
20 A Yes, I believe he wrote this in expressing
21 his views with respect to a committee that I
22 was on, yes.
23 Q All right. And the subjects to be avoided
24 which are listed on the last page include
25 "attempt to relate human disease to
5663
1 smoking."
2 Did I read that correctly?
3 A Yes.
4 Q All right. Another subject that
5 Dr. Seligman says the tobacco industry
6 should avoid is developing new tests for
7 carcinogenicity. Didn't you tell me earlier
8 today that the mouse skin was not a
9 satisfactory test for carcinogenicity?
10 A I did.
11 Q Why wouldn't the industry want to develop a
12 new test for carcinogenicity? Isn't that
13 exactly what you said everyone was looking
14 for?
15 A Well, I don't know what his view again was,

16 but maybe he felt that there was no relevant
17 test that you could develop.
18 Q How would you know if you didn't look?
19 A Well, what would you look for? I mean, we
20 were doing inhalation studies. But I'm --
21 if he's referring to things like tissue
22 culture tests, which CTR had done in the
23 past, as something that we should not invest
24 money in, I think he would be totally
25 correct in making that statement.

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1 That this is another test that's very
2 far removed from the human and probably has
3 little value. Why would you spend money
4 there. It's a question of your priorities.
5 Q And Dr. Seligman was stating that the
6 industry should avoid completely trying to
7 develop any new tests for carcinogenicity.
8 A The word "completely" is not here. You read
9 it correctly the first time. It says
10 developing new tests for carcinogenicity.
11 Q To avoid that.
12 A Subjects to be avoided.
13 Q Do you agree with Dr. Seligman that the
14 industry as of 1980 should have been
15 avoiding efforts to develop new tests for
16 carcinogenicity?
17 A As I recall, the U.S. government, through
18 the National Cancer Institute, had invested
19 heavily in trying to develop new tests for
20 carcinogenicity. They tried various
21 inhalation models, and none of these were
22 successful.

23 I think there was at that time a strong
24 indication that you could not -- there was
25 very little likelihood of developing some

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1 new relevant test for carcinogenicity. That
2 at this time I would say a better investment
3 in money would be to try to better
4 understand the mechanism of this disease.
5 And when that's the case, then you can
6 define more relevant tests.

7 Q Since 1980, has Lorillard spent any money to
8 try to develop a new test for
9 carcinogenicity?

10 A Lorillard has spent money in developing
11 mutagenic assays. In that field, yes, we
12 have.

13 Q I saw some mention somewhere of a study or
14 studies done at Harvard. Did you support
15 any studies at Harvard?

16 A Well, Lorillard has provided support to
17 Harvard for a program there that was
18 basically inhalation program in animals.

19 Q Now, who else participated with Lorillard in
20 funding that program?

21 A I can't be 100 percent sure, but I believe
22 all the major tobacco companies did.

23 Q And what was that program?

24 A Well, that was a -- as I say, an inhalation
25 program that was aimed at developing the

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1 methods and assessing whether or not there
2 was effect on the animals through smoke
3 inhalation.
4 Q What animals were being used in the Harvard
5 program?
6 A As I recall, it was rats and maybe pigeons
7 at one point.
8 Q And --
9 A I don't think -- I don't think the tobacco
10 industry supported pigeon work. I think
11 that was supported by the National Cancer
12 Institute. But it was the same
13 investigator.
14 Q Who was the investigator?
15 A Gary Huber was the principal investigator.
16 Q And was Huber a medical doctor?
17 A Yes, he was.
18 Q And was Dr. Huber looking at particular
19 disease outcomes of tobacco smoke
20 inhalation?
21 A Well, his specialty was pulmonary medicine,
22 and he was looking at the respiratory tract
23 in these animals.
24 Q Was he looking for tumors, or was he looking
25 for non-cancerous results?

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1 A I think he was looking at whatever might be
2 in the pathology. But, as I recall, there
3 were no tumors.
4 Q Did you ever meet Dr. Huber?
5 A Yes, I did.
6 Q All right. And did you review his
7 laboratory or his work?
8 A Yes.
9 Q In general terms, can you tell me what
10 Dr. Huber found as a result of exposing the
11 rats to cigarette smoke?
12 A Best as I recall he found some -- well, he
13 developed the methods, first of all, to try
14 to quantitate some of the changes in the
15 morphology of the cells in the lung, in the
16 lung itself, by measuring dimensions of
17 cells that after very different protocols
18 for fixation in the lung and tried to
19 quantify these kind of measurements. So he
20 was making measurements as to whether cell
21 dimensions in the various morphology of the
22 lung was changing or had changed as a result
23 of the inhalation of tobacco smoke.
24 He ran into a variety of difficulties,
25 as I recall, including infections in his

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1 animals.
2 Q His animals had infections?
3 A Well, they developed them. But this is a
4 general problem when you try to keep animals
5 for lifetime periods and look at microscopic
6 detail of their lungs. Frequently they're
7 complicated by both viral and bacterial
8 infections and confound the observations.
9 Q Did the amount of the infection affect, in
10 your view, the validity of the observations?
11 A I believe it did, and I believe the --

12 ultimately the work was terminated there.
13 And this related to further difficulties in
14 space and it was required to move his
15 laboratory at one point. So there were some
16 of these kinds of complications.
17 Q Did Dr. Huber make any final report of his
18 work to you as the sponsor or one of the
19 sponsors?
20 A No, although I believe he published some of
21 the work.
22 Q Did you ever read the report when it was
23 published?
24 A Yes, I've read the report. A long time ago.
25 Q Do you remember where it's published?

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1 A No, I do not.
2 Q Prior to the time that you read the
3 published report, were you aware of whatever
4 results Dr. Huber found?
5 A Well, as I said, I listened to seminars that
6 he gave, and best that I can recall, there
7 were no significant major conclusions as a
8 result of the work.
9 Q Dr. Spears, could you tell me the other
10 institutions that Lorillard has funded in
11 conjunction with others in the tobacco
12 industry? Excluding CTR now. So direct but
13 necessarily exclusive funding.
14 A Yes, the Washington University at St. Louis,
15 there was a -- there was funding there for a
16 period of time which the laboratories were
17 investigating the immunology -- the
18 immunological aspects of cancer.
19 Q Okay. Anywhere else?
20 A In terms of Lorillard, no. There was work
21 funded at the University of California, as I
22 recall, but Lorillard was not a funder.
23 There have been in the past other
24 laboratories that were funded. Going back
25 into the '50s, as I recall, investigators at

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1 the New York Medical College were funded for
2 some work relating to skin temperature
3 measurements.
4 There were some private laboratories
5 funded for a number of years that were
6 generating kind of general information about
7 the Kent cigarette at that time. This was
8 back in the '50s again. One of them was
9 Killian Laboratories.
10 Q You mentioned the Kent cigarette. Let me
11 just ask you, did the Kent cigarette during
12 the 1950s or some period have asbestos in
13 the filter?
14 A Yes, it did.
15 Q And is asbestos a known cause of a cancer of
16 the lining of the lung known as
17 mesothelioma?
18 A It is today, yes.
19 Q And for what years did Kent filters have
20 asbestos in the filter?
21 A For a period between 1952 and 1956.
22 Q Okay. Did anyone who worked at Lorillard at

23 the time the Kent filters were being
24 produced for asbestos ever develop
25 mesothelioma?

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1 A Did anyone who worked anywhere at Lorillard?
2 Q During the time the Kent filters were being
3 produced with asbestos ever develop
4 mesothelioma.

5 A You're saying during that time period.

6 Q No. That worked during that time period but
7 subsequently developed mesothelioma.

8 A Oh, I know of two persons who developed what
9 I believe were mesotheliomas. At least I
10 was told that. But I wouldn't know if there
11 were others. I mean, there could be.

12 Q Dr. Spears, I thank you. Those are the
13 questions I have for you today.

14 MR. PATRICK: Your Honor, that
15 completes the publication of the deposition
16 of Dr. Spears.

17 THE COURT: All right. Do we have
18 some documentary evidence to offer now,
19 Counselor?

20 MR. PATRICK: Yes, Your Honor, we
21 have some -- that would complete the reading
22 of depositions except maybe for a deposition
23 admitted for a very limited purpose on a
24 point that Mr. Ohlemeyer and I can talk
25 about. But for the most part, all the

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1 depositions have now been completed. We
2 would then take up matters of documentary
3 evidence and some other issues.

4 In fact, maybe -- Mr. Ohlemeyer, can I
5 approach you about --

6 (Bench discussion)

7 THE COURT: Have some exhibits to
8 offer regarding the depositions, Mr. Motley?

9 MR. MOTLEY: Yes, Your Honor. We
10 offer from the Gary Huber deposition, and if
11 I might just give you the exhibit numbers to
12 that deposition, Your Honor. Exhibit 1.

13 THE COURT: All right. We will
14 remark these. You probably have not
15 remarked these yet?

16 MR. MOTLEY: No, sir, we haven't.

17 THE COURT: Why don't we take a
18 minute to do that, Mr. Cassell. Maybe you
19 could go back --

20 MR. MOTLEY: What number would that
21 be? We can mark them, if you'll give me the
22 number.

23 MR. CASSELL: Start with No. 50 and
24 move right through.

25 MR. MOTLEY: We move No. 50 into

5673

1 evidence.

2 THE COURT: All right. That's the
3 Harvard Medical School Department of
4 Medicine letter? Do you have a copy of
5 that, Mr. Ohlemeyer?

6 MR. OHLEMEYER: Mr. Wagner has it.

7 MR. MOTLEY: Move it against RJR

8 only, Your Honor.
9 MR. WAGNER: We have an objection
10 to this document, Your Honor, in that it's
11 not a document of the defendants in this
12 case. It's written by Gary Huber, who
13 apparently at that time was a director of
14 the Harvard Medical School. It's addressed
15 to RJ Reynolds Industries, Inc., and so we
16 have objections to it, Your Honor, based
17 upon the fact that it's not a document of
18 any of the defendants in this case.
19 Does Your Honor have a copy of this?
20 THE COURT: I do.
21 MR. WAGNER: It's not a document
22 that's written by any of the defendants in
23 this case, and it's outside all the issues
24 in this case in addition to that, Your
25 Honor. And contains hearsay and it's
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1 irrelevant to any of the issues in this
2 case.
3 THE COURT: Mr. Motley?
4 MR. MOTLEY: Yes, Your Honor. This
5 is addressed to the defendant. It was
6 testified to by Dr. Huber. It was admitted
7 into evidence in the Texas case over similar
8 objection, and it goes to the research that
9 he was being paid to do by RJ Reynolds,
10 among others.
11 There's an identical letter as Exhibit
12 2 that will follow this, Your Honor.
13 Actually not an identical letter, but the
14 same subject matter to Dr. Spears dated
15 January 21st, 1980. He was asked about
16 this. He was asked if he reported his
17 findings to the sponsors. He said he did.
18 He identified these documents. He said he
19 had discussions with them afterwards,
20 learned that they had received it, and they
21 discussed the results.
22 THE COURT: Over objection, 50 will
23 be admitted.
24 (Plaintiffs' Exhibit(s) 50 received in
25 evidence.)
5675
1 THE COURT: What's the next
2 document?
3 MR. MOTLEY: 51, Your Honor.
4 THE COURT: Thank you.
5 MR. MOTLEY: I make the same
6 proffer. He was asked about this in the
7 deposition, identified it, stating what it
8 was. It was a report that he discussed with
9 the sponsors in reference to it. Offer it
10 against Lorillard only, Your Honor.
11 THE COURT: All right.
12 MR. OHLEMEYER: Your Honor, my only
13 objection, I would adopt Mr. Wagner's
14 objection and then add it's cumulative to
15 the witness' testimony and Dr. Spear's
16 testimony.
17 THE COURT: Admitted and overruled.
18 51 will be admitted.

19 (Plaintiffs' Exhibit(s) 51 received in
20 evidence.)
21 MR. MOTLEY: 52 is identical to 51,
22 Your Honor. It's offered solely against
23 Brown & Williamson for the same reason I
24 just stated. It's on the same date as 52.
25 Same date as 51, I'm sorry.

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1 THE COURT: Only as to Brown &
2 Williamson?
3 MR. MOTLEY: Yes, Your Honor.
4 THE COURT: Any objection from
5 Brown & Williamson?
6 MR. OHLEMEYER: Same objections,
7 Your Honor.
8 THE COURT: Noted and overruled.
9 52 will be admitted.

10 (Plaintiffs' Exhibit(s) 52 received in
11 evidence.)

12 MR. MOTLEY: Your Honor, we offer
13 53 for ID only. It's a newspaper report
14 which I asked him about to refresh his
15 memory. We don't offer it into evidence
16 against anyone. It was merely pointed out
17 to exist in the deposition to inquire about
18 it. We don't offer it against anybody.
19 Just for ID.

20 THE COURT: All right. I'll mark
21 this for identification 53. It's not
22 offered.

23 MR. MOTLEY: 54 is offered against
24 the Tobacco Institute, Your Honor, only. He
25 was asked about it. He identified it. He

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1 said he sent it. It's the subject matter of
2 the research that he was commissioned to do.

3 THE COURT: Tobacco Institute have
4 an objection?

5 MR. OHLEMEYER: Same objections,
6 Your Honor. I mean, I assume it's offered
7 against the members of the Tobacco
8 Institute?

9 MR. MOTLEY: Well, it's offered
10 only against the Tobacco Institute at this
11 time, Your Honor.

12 THE COURT: All right. Objection
13 is noted and overruled. 54 admitted only as
14 to Tobacco Institute.

15 (Plaintiffs' Exhibit(s) 54 received in
16 evidence.)

17 MR. MOTLEY: 55, Your Honor, is
18 offered only against Philip Morris. The
19 doctor was asked questions about it, based
20 part of his opinions on the document which
21 relates to smoke inhalation studies similar
22 to those he conducted.

23 MR. OHLEMEYER: Well, Your Honor, I
24 don't think the fact that Mr. Motley asked
25 Dr. Huber about a document that he didn't

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1 create or receive makes it relevant in this
2 lawsuit.

3 MR. MOTLEY: Well, Your Honor, the

4 point is here it was produced by Philip
5 Morris. It's stipulated to be authentic by
6 Philip Morris. It's in reference to the
7 absence of a perception by a witness can be
8 as important as the perception itself, Your
9 Honor. The fact that he worked with these
10 people and they didn't turn this research
11 over to him is a point that he made in the
12 deposition. They objected to the substance
13 of the testimony which was overruled. This
14 is confirmatory of his testimony.

15 MR. OHLEMEYER: It wasn't the
16 witness' testimony. It was Mr. Motley's
17 question. The witness said he didn't see
18 this. It wasn't sent to him.

19 MR. MOTLEY: And he also said it
20 was important, it would have been helpful
21 for him to have seen it, Your Honor, which
22 is the whole point here.

23 MR. OHLEMEYER: All he did, Your
24 Honor, was respond in the affirmative to the
25 question put to him in about the same way

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1 Mr. Motley just made the argument.

2 THE COURT: Objection is sustained.
3 55 will not be admitted.

4 (Plaintiffs' Exhibit(s) 55 not received
5 in evidence.)

6 MR. MOTLEY: 56. Your Honor, this
7 document was identified by Mr. Bumgarner,
8 who the jury has heard his video deposition
9 about. It was also asked of Dr. Huber,
10 whether they had shared these results with
11 him. This is part of what Mr. Bumgarner
12 worked on at the so-called mouse house.

13 THE COURT: Mr. Ohlemeyer?

14 MR. MOTLEY: Offered against RJR
15 only, Your Honor.

16 MR. WAGNER: Give me just a couple
17 seconds here so I can look at these.

18 THE COURT: Take your time. Take
19 your time.

20 MR. MOTLEY: Judge, did I give
21 you -- is this 56?

22 THE COURT: We're dealing with 56.

23 MR. WAGNER: This is Plaintiffs' 56
24 now?

25 THE COURT: Yes.

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1 MR. MOTLEY: Against Reynolds only.

2 MR. WAGNER: Objection, Your Honor,
3 as to relevancy. It's a 1969 document, Your
4 Honor. Doesn't have any relationship to
5 time frames in this case. It doesn't deal
6 with any of the issues in this case, so it's
7 irrelevant for all those reasons.

8 THE COURT: The relevancy and
9 remoteness objection is not well taken. It
10 will be overruled. 56 will be admitted only
11 as to RJR.

12 (Plaintiffs' Exhibit(s) 56 received in
13 evidence.)

14 MR. MOTLEY: 57, Your Honor, is

15 offered against Lorillard only at this time.
16 This is a document that Your Honor allowed
17 the substance to be discussed in the
18 deposition of Dr. Huber. It relates to
19 their description of the value of the -- and
20 the nature of the research that was being
21 undertaken by Dr. Huber at the request of
22 the various sponsors, including Lorillard.

23 MR. OHLEMEYER: I have no objection
24 to this document, Your Honor.

25 THE COURT: 57 will be admitted
5681

1 only as to Lorillard.

2 (Plaintiffs' Exhibit(s) 57 received in
3 evidence.)

4 MR. MOTLEY: Your Honor, 58 is
5 offered against Lorillard only. It deals
6 again with Dr. Huber's testimony and
7 Dr. Huber's research. It was also discussed
8 in the deposition of Dr. Spears that we just
9 saw in connection with Dr. Huber. It's
10 offered only against Lorillard.

11 MR. OHLEMEYER: Your Honor, again,
12 I think this is a document that lacks
13 foundation to make it relevant or admissible
14 in this case. There was no testimony about
15 it, but for Mr. Motley's questions about it.
16 And I think that it's unclear as to what
17 the author is discussing and that for those
18 reasons it's not relevant to any of the
19 issues to be decided in the case.

20 MR. MOTLEY: Your Honor, he was
21 asked specifically about this document,
22 No. 4 was quoted to him, and he was asked
23 about it. So was Dr. Spears.

24 MR. OHLEMEYER: And obviously I
25 have no objection to the witnesses being
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1 asked the questions. But the fact that this
2 person wrote this or whether even formed a
3 predicate for Mr. Motley's questions doesn't
4 make the document admissible. He's gotten
5 the testimony from the witnesses about that
6 subject.

7 MR. MOTLEY: Produced by Lorillard,
8 from their files, Your Honor, admitted in
9 the Texas deposition, the substance of the
10 question was overruled by Your Honor when
11 they objected to it. It demonstrates that
12 they considered what he was doing to be for
13 public relations instead of for science.
14 Forms part of the substance and subject
15 matter of the testimony he gave about what
16 he understood to be the purpose he was hired
17 to do the research versus what they
18 internally said it was for.

19 MR. OHLEMEYER: With all due
20 respect, Your Honor, Mr. Motley keeps
21 talking about they.

22 MR. MOTLEY: Lorillard. It's from
23 the president of Lorillard's own handwritten
24 notes, Your Honor. I don't believe he's
25 going to dispute that Mr. Judge was the

1 president of Lorillard when he wrote this.

2 MR. OHLEMEYER: That still doesn't
3 make the document admissible. The testimony
4 he got from the witnesses stands as the
5 evidence in this case.

6 THE COURT: You're right.
7 Objection is sustained. 58 will not be
8 admitted.

9 (Plaintiffs' Exhibit(s) 58 not received
10 in evidence.)

11 MR. MOTLEY: 59, Your Honor, we
12 offer against -- I believe 59 is already in.
13 I think we've read this to the jury already.

14 THE COURT: All right.

15 MR. MOTLEY: No. 60, Your Honor, we
16 marked for -- mark for ID only. This is his
17 internal notes. He didn't indicate he had
18 shared it with anybody.

19 THE COURT: 60 marked for
20 identification only, not offered.

21 MR. MOTLEY: Judge, what's the date
22 of that one I just gave you?

23 THE COURT: The date would be June
24 12, 1981.

25 MR. MOTLEY: 61, Your Honor, we
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1 we've marked for ID only.

2 THE COURT: Thank you. 61 marked
3 for identification only. Not offered.

4 MR. MOTLEY: 62, Your Honor, I
5 believe is already in.

6 63 we would offer for ID only. Judge,
7 these are all documents that were referred
8 to in the deposition.

9 THE COURT: Right. 63 for
10 identification only, not offered.

11 MR. MOTLEY: 64 is offered only for
12 ID at this time.

13 THE COURT: Thank you. 64 for
14 identification only, not offered.

15 MR. MOTLEY: 65 is the same, ID
16 only. And that's the last exhibit in the
17 deposition, Your Honor.

18 THE COURT: All right. 65
19 admitted, or not admitted, but offered for
20 identification only.

21 Now, of the admitted exhibits,
22 Mr. Motley, are there any that you care to
23 publish at this point?

24 MR. MOTLEY: Can I have one second,
25 Your Honor?

1 THE COURT: Yes.

2 MR. MOTLEY: Judge, we'll just save
3 it for closing argument. We won't take up
4 the time to publish them.

5 THE COURT: All right. No other
6 documents from the depositions from the
7 plaintiff.

8 The defense have any documents they
9 would like to offer from the depositions?

10 MR. OHLEMEYER: No, Your Honor.

11 THE COURT: All right.
12 MR. MOTLEY: Your Honor, you asked
13 us at lunch time if we were going to read
14 Dr. Farone's deposition. We've decided not
15 to do that.
16 THE COURT: All right.
17 MR. MOTLEY: Which is going to save
18 us about two hours. We have numerous
19 document matters that we brought to Your
20 Honor's attention.
21 THE COURT: We'll deal with those
22 when I discharge here in a minute.
23 MR. MOTLEY: Okay.
24 THE COURT: No other --
25 MR. MOTLEY: I need to check with
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1 my colleagues, Judge.
2 THE COURT: Sure.
3 MR. MOTLEY: Your Honor, we have
4 the issue of Mr. Dunn we had raised
5 yesterday, and then we have some
6 interrogatories we want to publish. Would
7 you have us publish the interrogatories now
8 unless you all reached some agreement there.
9 MR. PATRICK: Let me just --
10 (A discussion was held off the record.)
11 (Bench discussion)
12 THE COURT: If I understand the
13 plaintiffs would like to call another
14 witness. Mr. Cross.
15 MR. CROSS: Yes, Your Honor.
16 Plaintiffs would call the plaintiff, Craig
17 Dunn.
18 THE COURT: Raise your right hand.
19 PLAINTIFFS' WITNESS, CRAIG DUNN, SWORN
20 THE COURT: Have a seat. Tell this
21 jury your name.
22 THE WITNESS: Craig Dunn.
23 THE COURT: Spell your last.
24 THE WITNESS: D-U-N-N.
25 THE COURT: Mr. Cross.

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1 DIRECT EXAMINATION
2 BY MR. CROSS:
3 Q Mr. Dunn, state your address, please.
4 A [DELETED]
5 Q I believe during the voir dire process I
6 referred to you as being a Carmel resident.
7 Didn't I attribute your place of residence
8 erroneously?
9 A Yes, you did.
10 Q Have you ever lived in Carmel?
11 A Never.
12 Q All right. Now, very briefly, Mr. Dunn, you
13 are -- what is your occupation? Let me ask
14 you that first.
15 A I am the assistant general secretary for the
16 Wesleyan Church.
17 Q And what exactly is the Wesleyan Church?
18 A It's a religious denomination. We have
19 worldwide interests, about 1700 churches in
20 the U.S. and Canada.
21 Q And what does your role as assistant general

22 secretary of that organization encompass?
23 A Quite a few different functions. My main
24 job, our office is responsible for the legal
25 affairs for the denomination, and that's the
DUNN-DIRECT

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1 area that's been given to me to take
2 responsibility over. So I oversee all the
3 legal affairs of the denomination worldwide.
4 Q Do you have any legal training?
5 A Yes. I'm a graduate of Indiana University
6 School of Law.
7 Q Are you a practicing attorney?
8 A No, I'm not.
9 Q Have you ever been a practicing attorney?
10 A No.
11 Q And has your legal experience been
12 associated exclusively with the church and
13 church matters?
14 A Yes, it has.
15 Q Now, you are a named plaintiff in this
16 action, are you not?
17 A That's correct.
18 Q And you were appointed as one of the
19 administrators in this case by Judge Hunt of
20 the Grant Circuit Court?
21 A Yes, I was.
22 Q And you were a co-administrator with whom?
23 A Phil Wiley.
24 Q And have you served as an administrator of
25 an estate before?

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1 A Yes, I have. Several.
2 Q Now, this particular administration for --
3 strike that.
4 Who was the decedent for whom this
5 particular administration was created?
6 A Mildred Wiley.
7 Q And were you personally acquainted with
8 Mildred Wiley?
9 A Yes, I was.
10 Q Now, subsequent to your appointment as
11 personnel representative or administrator in
12 this estate, do you understand that the
13 estate -- jurisdiction of the estate was
14 transferred?
15 A Yes. To Delaware County.
16 Q And do you know what court currently has
17 jurisdiction of this particular estate
18 proceeding?
19 A To the best of my knowledge, it's this one,
20 Judge Barnet.
21 Q Okay. Thank you.

22 MR. CROSS: Judge, we would ask at
23 this time pursuant to Indiana Rule of
24 Evidence Rule 201 to acknowledge that the
25 estate is duly formed and under jurisdiction

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1 of this Court.
2 THE COURT: Do you wish to be
3 heard, Mr. Wagner?

4 MR. WAGNER: Hang on just a second,
5 Your Honor.
6 MR. OHLEMEYER: If that is a fact,
7 Your Honor, I have no objection to your
8 taking judicial notice of it.
9 THE COURT: Do you have some
10 documents that I can rely on, Counselor?
11 Did you bring any?
12 MR. CROSS: They were in the room.
13 I can bring them. I thought that that was a
14 subject -- Mr. Ohlemeyer offered to
15 stipulate it so I didn't realize it would be
16 an issue.
17 MR. OHLEMEYER: If it's a fact, I
18 have no --
19 MR. CROSS: I will submit those at
20 the break.
21 THE COURT: Well, I need to review
22 the documents, Counselor, before I can do
23 that so I'll take that request under
24 advisement.
25 MR. CROSS: Thank you, sir.

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1 Q Do you have your notes with you?
2 A Yes, I do.
3 Q I'd draw your attention to Item No. 6, and
4 indicate to you that we do not -- I am not
5 going to ask you any questions about that
6 item. Okay? So with that exception, can
7 you tell this jury what other occupations or
8 positions you hold other than the assistant
9 general secretaryship of the Wesleyan
10 Church?
11 A Yes. I'm also the director of archives and
12 historical library for the denomination,
13 basically responsible for collecting
14 important historical documents related to
15 the denomination.
16 I'm corporate secretary for the Indiana
17 Central District of the Wesleyan Church,
18 responsible to maintain corporate records
19 for that corporation.
20 Also keep an accurate list of the
21 churches and ministers in the central
22 Indiana area.
23 I'm chairman of the trustees at our
24 local church, which is located in Fishers,
25 Indiana.

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1 And I also teach for one of the
2 denomination's colleges, Indiana Wesleyan
3 University, it's located in Marion, and I
4 teach in their adult education program.
5 Q Thank you, Mr. Dunn.
6 How did you come to be a -- how did you
7 come to be a personal representative of
8 Mildred Wiley's estate?
9 A I was asked to by her husband, Phil Wiley.
10 Q How long did you know Mildred Wiley and her
11 husband, Phil?
12 A I met them first in 1974 and, obviously,

13 know Mr. Wiley still today, 24 years later,
14 and knew Mildred until her death in 1991.
15 Q Now, let me ask you, there has been -- you
16 have been in the courtroom through the
17 duration of this trial, have you not?
18 A Yes, I have.
19 Q Without going into a great deal of detail,
20 can you tell the jury what, in your own
21 personal knowledge, you have had occasion to
22 observe with respect to the kind of person
23 that Mildred Wiley was?
24 MR. WAGNER: Judge, I don't mean to
25 interrupt this, but this surely has to be
DUNN-DIRECT

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1 cumulative at this point, Your Honor, this
2 late in the trial. We've probably heard
3 from six or seven witnesses.
4 MR. CROSS: Your Honor, please, I
5 think the jury is entitled to know something
6 about this plaintiff and his version of the
7 events, and I can represent to the Court
8 that almost certainly his testimony would be
9 shorter than Mr. Wagner's objections.
10 THE COURT: Go ahead, Counselor.
11 Overruled.
12 A I've listened to the testimony, obviously,
13 over the last three plus weeks, and I
14 haven't heard a word yet negative about Mrs.
15 Wiley. I would confirm everything positive
16 that's been said about her from every other
17 witness. And would just like to add from my
18 own perspective, she was probably one of the
19 kindest ladies I ever knew.
20 Q And have you had occasion since her death to
21 observe the extent of the loss, love, care,
22 and affection that has been experienced by
23 her husband by reason of the death of
24 Mildred Wiley?
25 A Yes. I still carry a picture in my own mind
DUNN-DIRECT

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1 of the years that I knew Mr. and Mrs. Wiley
2 together. And when I look at Mr. Wiley,
3 even today, I still see his wife with him.
4 From my own personal observation, there
5 has been a great loss felt there. Just one
6 little example I can remember, it was just a
7 week ago today, Mr. Wiley reminded me that
8 it was supposed to be he and his wife's 43d
9 wedding anniversary, so he is still feeling
10 that loss very heavily, even as this trial
11 is going on.
12 Q And finally, Mr. Dunn, are you receiving --
13 have you received any compensation for your
14 services as personal representative of the
15 estate?
16 A No, I have not.
17 Q Have you received any payment of any kind
18 whatsoever for anything you've done in
19 regard to this case?
20 A No, I have not.
21 MR. CROSS: No further questions.

22 MR. OHLEMEYER: May we approach for
23 a moment?
24 (Bench discussion)
25 MR. OHLEMEYER: I have no
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1 questions, Your Honor.
2 MR. WAGNER: I have no questions,
3 Your Honor.
4 THE COURT: All right. Mr. Dunn,
5 thank you. You may step down.
6 THE WITNESS: Thank you.
7 THE COURT: There was still a
8 request for judicial notice, and whenever
9 you get the documents I'll review those,
10 Counselor.
11 MR. CROSS: Yes, Your Honor.
12 THE COURT: There's some
13 interrogatory answers that have been
14 provided Counsel for defense?
15 MR. PATRICK: Yes, Your Honor. At
16 this time we would like to publish answers
17 to interrogatories that were posed to the
18 defendants in this litigation, and the
19 answers that they gave regarding certain
20 issues, such as the brands of cigarettes
21 they made, as well as certain other issues.
22 THE COURT: You will then identify
23 the document, identify the time and the
24 signator of the document?
25 MR. PATRICK: That's correct, Your

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1 Honor.
2 THE COURT: Mr. Ohlemeyer and
3 Mr. Wagner, you have seen a copy of these.
4 You know what he's got right now?
5 MR. OHLEMEYER: Yes.
6 THE COURT: Is there any objection?
7 MR. OHLEMEYER: No.
8 MR. WAGNER: To some of them.
9 THE COURT: Apparently there is two
10 schools of thought on that. All right.
11 MR. PATRICK: Your Honor, at this
12 time we publish portions of the answers of
13 the Defendant American Tobacco Company to
14 the plaintiffs' first interrogatories in
15 this case.
16 They were verified by Patrick Ferguson,
17 assistant secretary of the American Tobacco
18 Company, on December, I believe, 20th of
19 1993. The question that was posed, the
20 interrogatory that was posed --
21 THE COURT: Is there an objection
22 to that, Counsel?
23 MR. OHLEMEYER: No. No.
24 THE COURT: Go ahead.
25 MR. PATRICK: Interrogatory No. 17:

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1 "List each brand of cigarettes manufactured
2 and/or sold by you in the last 20 years, and
3 for each such brand state the inclusive
4 years and when each such brand was
5 manufactured or sold by you.

6 "Answer: American states that American
7 has manufactured and sold nationally the
8 following brand name cigarettes during the
9 last 20 years: American Lights, 1988 to
10 present; American Longs, 1975 to 1977; Bull
11 Durham, 1973 to present; Carltons, 1973 to
12 present; Crowns of London, 1993 to present;
13 Half and Half, 1973 to '75; Herbert
14 Tareyton, 1973 to present; Iceberg, 1973 to
15 1985; Lemon Twist Menthol, 1973 to 1975;
16 Long Johns, 1976 to 1984; LTC Filters, 1971
17 to 1973; Lucky 100's, 1973 to 1984; Lucky
18 Strike 1973 to present; Lucky Ten, 1974 to
19 1983; Malibu, 1987 to present; Mermaid, 1971
20 to '73; Misty Slims, 1990 to present;
21 Montclair, 1973 to 1975, and then 1990 to
22 present; Pall Mall, 1973 to present; Prime,
23 1992 to present; Private Stock, 1992 to
24 present; Riviera, 1992 to present; Safari,
25 1973 to 1975; Silva Thins, 1973 to present;

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1 Summit, 1992 to present; Super M, 1975 to
2 1976; Tall, 1978 to present, Tareyton, 1973
3 to present; and Twist, 1974 to 1981."

4 Your Honor, that's all we intend to
5 publish out of the answers from the
6 interrogatories posed to American Tobacco
7 Company.

8 THE COURT: All right.

9 MR. PATRICK: Your Honor, the next
10 set of interrogatory answers that we intend
11 to publish are the Brown & Williamson
12 Tobacco Corporation's responses to
13 plaintiffs' first interrogatories, which
14 were verified on December 27, 1993, by the
15 treasurer for Brown & Williamson, Charles D.
16 Francesconi.

17 THE COURT: Any objection,
18 Mr. Ohlemeyer?

19 MR. OHLEMEYER: No, Your Honor.

20 THE COURT: All right.

21 MR. PATRICK: Interrogatory No. 17:
22 "Please list each brand of cigarettes
23 manufactured and/or sold by you in the last
24 20 years, and for each such brand state the
25 inclusive years when each such brand was

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1 manufactured and/or sold by you.

2 "Response: Brown & Williamson states
3 that it has manufactured and sold nationally
4 the following brand name cigarettes during
5 the last 20 years: Kool, pre-1973-1973 to
6 present; Barclay, 1981 to present; Richland,
7 1988 to present; Du Maurier," which is
8 spelled D-U M-A-U-R-I-E-R, "pre-1973 to
9 present; Belair, pre-1973 to present;
10 Viceroy, pre-1973 to present; Artic Lights,
11 1979 to 1982; B&W, pre-1973 to, and they
12 state termination date unavailable; Raleigh,
13 pre-1973 to present; GPC, 1984 to present;
14 Capri, 1987 to present; and Savannah, 1992
15 to present."

16 And, Your Honor, that completes the

17 reading of Brown & Williamson's answers.
18 THE COURT: All right.
19 MR. PATRICK: The next set of
20 interrogatories would be Philip Morris,
21 Incorporated, responses to plaintiffs' first
22 interrogatories, and these were verified by
23 the assistant secretary of Philip Morris,
24 Incorporated, Diane McAdams, on December 14,
25 1993.

5700

1 THE COURT: Any objection?
2 MR. OHLEMEYER: No, Your Honor.
3 THE COURT: Thank you. Go ahead.
4 MR. PATRICK: Interrogatory No. 17:
5 "List each brand of cigarettes manufactured
6 and/or sold by you in the last 20 years and
7 for each such brand state the inclusive
8 years when such brand was manufactured
9 and/or sold by you.
10 "Philip Morris states that Philip
11 Morris or its predecessors have manufactured
12 and sold nationally the following brand name
13 cigarettes during the last 20 years:
14 Alpine, pre-1973 to present; Basic, 1990 to
15 present; Benson & Hedges, pre-1973 to
16 present; Bristol, 1989 to present; Bucks,
17 1989 to present; Cambridge, 1980 to present;
18 Cartier, 1989 to present; Commander, 1989 to
19 present; English Ovals, pre-1973 to present;
20 Galaxy, pre-1973 to present; Hi-Lite, 1977
21 to present; Marlboro, pre-1973 to present;
22 Merit, 1975 to present; Multifilter,
23 pre-1973 to present; Parliament, pre-1973 to
24 present; Philip Morris, pre-1973 to 1988;
25 Players, pre-1973 to present; Saratoga, 1975

5701

1 to present; Virginia Slims, pre-1973 to
2 present.
3 Philip Morris has also manufactured
4 certain product labels under contract for
5 distributors since 1986. In addition,
6 Philip Morris has, over the years, test
7 marketed certain brands."
8 And, Your Honor, that concludes the
9 reading of the first set of interrogatories
10 to Philip Morris.

11 THE COURT: All right.
12 MR. PATRICK: We will next read the
13 response of the Defendant RJ Reynolds
14 Tobacco Company to plaintiffs' first
15 interrogatories, which were verified on
16 December 20, 1993, by Kenneth J. Lapijko,
17 L-A-P-I-J-K-O, who was the vice president of
18 finance and accounting for RJ Reynolds
19 Tobacco Company.

20 MR. WAGNER: No. 17?
21 MR. PATRICK: Reading Interrogatory
22 No. 17.
23 MR. WAGNER: Judge, we have no
24 objection to reading Interrogatory No. 17 as
25 long as it's clear that the words "to the

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1 present" that appear would be up to and

2 including December 20, 1993, when these
3 answers to interrogatories were verified.
4 THE COURT: All right. Make that
5 clear.
6 MR. PATRICK: That's fine.
7 Interrogatory No. 17: "List each brand of
8 cigarettes manufactured and/or sold by you
9 in the last 20 years and for each such brand
10 state the inclusive years when each such
11 brand was manufactured and/or sold by you.
12 "Response: Reynolds states that it
13 manufactured and sold nationally the
14 following brand of cigarettes between 1972
15 and 1992: Camel, 1913 to present; Winston,
16 1954 to present; Salem, 1956 to present;
17 Tempo, 1964 to 1974; Vantage, 1970 to
18 present; Doral, 1969 to 1980, 1984 to
19 present; Moore, 1975 to present; Now, 1976
20 to present; Magnum, 1989 to present;
21 Sterling, 1984 to 1987, and then 1990 to
22 present; Century, 1983 to present; Bright,
23 1982 to 1987; Real, 1977 to 1980; Ritz, 1986
24 to 1991; and Monarch, 1992 to present.
25 "Reynolds also has sold other cigarette
5703
1 brands in test markets only and has
2 manufactured private label brands for
3 distributors."
4 That completes reading of the RJ
5 Reynolds answers concerning brand names.
6 Next, Your Honor, we would read the
7 answers of the Lorillard Tobacco Company
8 responses to plaintiffs' first
9 interrogatories, which are dated or verified
10 on December 17, 1993, by Peter J. Marzullo,
11 treasurer and assistant secretary.
12 THE COURT: Any objection?
13 MR. OHLEMEYER: No, Your Honor.
14 MR. PATRICK: Interrogatory No. 17:
15 "List each brand of cigarettes manufactured
16 and/or sold by you in the last 20 years, and
17 for each such brand state the inclusive
18 years when each such brand was manufactured
19 and/or sold by you.
20 "Response: Lorillard states that
21 Lorillard, or its predecessors, has
22 manufactured and sold nationally the
23 following brand name cigarettes during the
24 last 20 years: Old Gold, pre-1973 to
25 present; Kent, pre-1973 to present; Golden
5704
1 Lights, 1978 to 1983; Newport, pre-1973 to
2 present; Spring, pre-1973 to present; True,
3 pre-1973 to present; Max, 1975 to present;
4 Triumph, 1979 to present; Satin, 1982 to
5 present; Heritage, 1982 to -- 1981 to 1982,
6 and then 1990 to 1992; Style, 1991 to
7 present; L.T. Brown, 1975 to 1977.
8 "Lorillard has over the years also test
9 marketed certain brands."
10 And that completes the reading from the
11 Lorillard answer.
12 Your Honor, the next group or next

13 answers to interrogatories will be the
14 Defendant Liggett Group, Incorporated,
15 responses to plaintiffs' first
16 interrogatories.
17 THE COURT: Does Liggett have an
18 objection?
19 MS. ESAKOFF: Sharon Esakoff for
20 Liggett. No objection, Your Honor.
21 THE COURT: Thank you.
22 MR. PATRICK: Verified on December
23 17, 1993, by Josiah Murray, senior vice
24 president, general counsel, and secretary to
25 the Liggett Group.

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1 Interrogatory No. 17: "List each brand
2 of cigarette manufactured and/or sold by you
3 in the last 20 years and for each such brand
4 state the inclusive years when each such
5 brand was manufactured and/or sold by you.

6 "Answer: Liggett states that it or its
7 predecessors has manufactured or sold
8 nationally the following brands of
9 cigarettes in the last 20 years: Adam;
10 pre-1973 to 1973; Chesterfield, pre-1973 to
11 present; Decade, 1976 to 1983; Eagle 20's,
12 1976 to 1977; Eve, 1980 to present; Fatima,
13 F-A-T-I-M-A, pre-1973 to 1980; Home Run,
14 pre-1973 to 1980; L&M, pre-1973 to present;
15 Lark, pre-1973 to present; Oasis, pre-1973
16 to 1983; Omni Luxury Lights, 1981 to 1984;
17 Picayune, pre-1973 to present; Piedmont,
18 pre-1973 to 1980; Pyramid, 1988 to present;
19 Stride, 1985 to 1986; St. Moritz, 1974 to
20 1986; Vello, 1976 to 1977; and various
21 generic brands, 1980 to present."

22 Your Honor, that completes the reading
23 of the Liggett answers.

24 Your Honor, we would also read from the
25 Philip Morris Incorporated's Response to

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1 Plaintiffs' First, and in parentheses,
2 Second Request for Admissions. These
3 requests for admissions were -- excuse me.

4 Your Honor, I'm sorry, we don't have a
5 date on these request for admissions on this
6 particular request, although the document
7 that we requested for them to admit is dated
8 April 12, 1994.

9 THE COURT: I think I have that.

10 MR. PATRICK: First of all, I guess
11 do you have an objection?

12 MR. OHLEMEYER: To?

13 MR. PATRICK: Reading the request
14 for admission and offering the document.

15 MR. OHLEMEYER: I have no objection
16 to the document.

17 MR. PATRICK: Your Honor, at this
18 time with agreement of counsel we would
19 simply offer the document dated April 12,
20 1994. They were appended to the Philip
21 Morris Request for Admissions and offer that
22 into evidence as the next exhibit.

23 THE COURT: Any objection,

24 Mr. Ohlemeyer?
25 MR. OHLEMEYER: No. I just want to
5707
1 see the form in which it's going to be
2 offered.
3 THE COURT: I have it right here, I
4 think.
5 MR. OHLEMEYER: No. I have no
6 objection.
7 THE COURT: Do you want to mark
8 that then, Counselor?
9 MR. PATRICK: Sure.
10 MR. CASSELL: 66.
11 THE COURT: 66 will be admitted.
12 (Plaintiffs' Exhibit(s) 66 received in
13 evidence.)
14 MR. PATRICK: Your Honor, at this
15 time we would just offer into evidence and
16 not publish anything at this point.
17 THE COURT: All right.
18 MR. PATRICK: Your Honor, we will
19 now publish answers to Philip Morris'
20 Responses to the Third Set of
21 Interrogatories, which were verified on
22 January 17, 1976 -- excuse me, January 17,
23 1996, by Dennis Floam, assistant secretary.
24 THE COURT: Any objection,
25 Mr. Ohlemeyer?

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1 MR. OHLEMEYER: I don't think so,
2 Your Honor.
3 Okay. No objection.
4 THE COURT: Do you want to read
5 those, Counselor?
6 MR. PATRICK: Yes, Your Honor.
7 THE COURT: Go ahead.
8 MR. PATRICK: Interrogatory 19:
9 "Was James W. Bowling employed by you during
10 the calendar year 1976? If your answer is
11 'yes,' then state the following:
12 "A, all the years Mr. Bowling was
13 employed by Philip Morris, Incorporated.
14 "B, capacity or position of Mr. Bowling
15 while with Philip Morris, Incorporated
16 during such years.
17 "C, name, current address, and the
18 telephone number of persons/superiors
19 Mr. Bowling reported to while at Philip
20 Morris, Incorporated.
21 "And name, current address, and
22 telephone number of the custodian of
23 Mr. Bowling's business, office, and
24 correspondence files and location of such
25 files.

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1 "Philip Morris states that James C.
2 Bowling was employed by Philip Morris from
3 approximately 1951 to 1986. During this
4 time, Mr. Bowling held several different
5 positions, including: Director of Public
6 Relations; Assistant to the President; Vice
7 President, Director of Sales and Corporate
8 Relations; Assistant to the Chairman of the

9 Board; Director of Corporate Affairs; Vice
10 President, President and Director of
11 Corporate Affairs, and Senior Vice President
12 and Director of Corporate Affairs.

13 "Mr. Bowling reported to many people
14 during his 36-year tenure with Philip
15 Morris, and it would be unduly burdensome
16 for Philip Morris to attempt to identify
17 them all. Mr. Bowling reported directly to
18 at least the following individuals during
19 the later years of his employment with
20 Philip Morris: Hammish Maxwell; Joe
21 Cullman, III; William J. O'Connor. The
22 custodian of Mr. Bowling's records at Philip
23 Morris is Russell Bertelsen, 120 Park
24 Avenue, 17th Floor, New York, New York."

25 Interrogatory No. 20: "Was Dr. Helmut
5710

1 Wakeham employed by Philip Morris during the
2 calendar year 1976? If your answer is
3 'yes,' then state the following:

4 "All the years Dr. Wakeham was employed
5 with Philip Morris, Incorporated.

6 "Capacity or position of Dr. Wakeham
7 while he was with Philip Morris,
8 Incorporated, during such years.

9 "Name, current address, and telephone
10 number of persons/superiors Dr. Wakeham
11 reported to while at Philip Morris.

12 "And name, current address, and
13 telephone number of the custodian of
14 Dr. Wakeham's business, office, and
15 correspondence files and location of such
16 files.

17 "Response: Philip Morris states that
18 Dr. Helmut Wakeham was employed by Philip
19 Morris from approximately 1958 to 1982. He
20 was originally hired as a scientist, but he
21 also held the positions of Vice President of
22 Science and Technology, Vice President and
23 Director of Research and Development, and
24 Vice President and Chief Scientist.

25 "Dr. Wakeham reported to many people
5711

1 during his 25-year tenure at Philip Morris,
2 and it would be unduly burdensome for Philip
3 Morris to attempt to identify them all.
4 Dr. Wakeham reported directly to at least
5 the following individuals during the latter
6 years of his employment with Philip Morris:
7 W. Wallace McDowell; Clifford H. Goldsmith;
8 William J. O'Connor; and Frank Resnik. The
9 custodian of Dr. Wakeham's records at Philip
10 Morris is Russell Bertelsen, 120 Park
11 Avenue, 17th Floor, New York, New York."

12 Interrogatory No. 26: "What is the
13 Center for Indoor Air Research? If you're
14 able to identify this organization, then
15 state the following:

16 "A, when it was founded and for what
17 purpose.

18 "B, how it is funded.

19 "C, have you contributed any funds to

20 this organization, and if you did, what
21 amount.
22 "What are applied or other projects and
23 how are they funded.
24 "Who are, or were, members or employees
25 of this entity.

5712

1 "Who are, or were, the members of the
2 Scientific Advisory Board.
3 "Who are, or were, the members of the
4 board of directors and.
5 "Identify all documents and research
6 received from this organization.
7 "Response: Philip Morris states that
8 the Center for Indoor Air Research, CIAR, is
9 a nonprofit corporation founded in 1988 to
10 sponsor high quality scientific research on
11 indoor air issues.
12 "CIAR is funded through its membership,
13 which consists of Charter members, Regular
14 members, and Associate members. Its current
15 membership is as follows: Philip Morris,
16 U.S.A., RJ Reynolds Tobacco Company,
17 Lorillard Tobacco Company, Brown &
18 Williamson Tobacco Corporation, and Svenska
19 Tobaks AB, (Charter members); Hoechst
20 Celanese and Mead Paper (Regular members);
21 and Dibrell Brothers, Inc., Ecusta,
22 E-C-U-S-T-A, Division of PH Glatfelter
23 Company, J.W. Fergusson, Inc., International
24 Paper, Monk Austin, Mundet International,
25 Ltd., Quest International Flavors, USA,

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1 Shorewood Packaging, Somerville Packaging
2 Corporation, Standard Commercial
3 Corporation, United Technologies Carrier
4 Corporation, and Zeneca Specialty, Inc., who
5 are associate members. Philip Morris U.S.A.
6 was a founding member of CIAR and has
7 contributed \$24,927,482 since 1989.
8 "Nearly 75 percent of research funded
9 by the CIAR is funded through grants. The
10 Science Advisory Board of CIAR, which
11 consists of highly qualified individuals
12 with reputations for expertise and
13 scientific leadership and disciplines
14 relative to indoor air research, develops a
15 research agenda for CIAR, which then
16 announces to the scientific community at
17 large that applications in response to the
18 agenda are being accepted. Proposals are
19 reviewed first for scientific quality by the
20 applicants' peers. CIAR maintains a list of
21 over 100 peer reviewers at various
22 educational, government, and private
23 facilities to assist in the peer evaluation
24 process. The SAB then reviews the
25 applications and the peer evaluations and

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1 develops recommendations on the selection of
2 applications. Those recommendations are
3 submitted for final approval to the CIAR
4 board of directors which consists of

5 scientists from the sponsoring companies.
6 "CIAR has also funded a limited number
7 of 'applied' or 'contract' studies which are
8 reviewed and approved by CIAR member
9 scientists and, in most instances, by
10 selected members of the SAB. In addition,
11 the CIAR provides funding for workshops,
12 symposia, and the publication of monographs
13 on indoor air issues.

14 "The SAB, Scientific Advisory Board,
15 currently consists of the following members:
16 William S. Cain; Michael R. Guerin; Irving.
17 I. Kessler; Morton Lippmann; Genevieve M.
18 Matanoski; Demetrios Moschandreas; Mark J.
19 Utell; Alfred P. Wolf; and James E. Woods,
20 Jr. The Board of Directors currently
21 consists of: Alex W. Spears; Richard A.
22 Carchman; Charles R. Green; J. Daniel Heck;
23 Inger Wahlberg; Lutz Mueller; Helmut M.
24 Reif; Scott Appleton; and Tilford Riehl."

25 MR. PATRICK: Your Honor, that
5715

1 completes the reading of the answers to
2 Philip Morris -- answers to the
3 interrogatories to Philip Morris.

4 THE COURT: I think we'll take a
5 short break right here. Ladies and
6 gentlemen, we'll break for about ten
7 minutes. We'll come back. If you go
8 outside, leave your notes in the jury room.

9 (Standard admonition.)

10 (A recess was taken.)

11 MR. CASSELL: All rise.

12 THE COURT: Be seated.

13 Jury back in its entirety, together
14 with the alternates.

15 Mr. Patrick.

16 MR. PATRICK: Yes, Your Honor.

17 Just a few more additional things.

18 First of all, Counsel for defendant,
19 Mr. Ohlemeyer, has stipulated with me to a
20 list that was provided by the Tobacco
21 Institute of the membership of the Tobacco
22 Institute from 1958 to 1995, and we would
23 simply mark that as an exhibit to be placed
24 into evidence.

25 THE COURT: All right. Will be
5716

1 marked 67. No objection to that, Counselor?

2 MR. OHLEMEYER: That's correct,
3 Your Honor.

4 THE COURT: All right. 67 will be
5 admitted.

6 (Plaintiffs' Exhibit(s) 67 received in
7 evidence.)

8 MR. PATRICK: And Mr. Ohlemeyer and
9 I have also reached a stipulation on behalf
10 of the plaintiff and the defendant to the
11 effect that Fred Panzer, P-A-N-Z-E-R, held
12 the title of assistant vice president for
13 public relations for the Tobacco Institute
14 for the years 1970 and 1971.

15 THE COURT: Is that your

16 stipulation, Mr. Ohlemeyer?
17 MR. OHLEMEYER: Yes, it is, Your
18 Honor.
19 THE COURT: Ladies and gentlemen,
20 when there is a stipulation, that means that
21 no further proof is required of that
22 particular item. The parties have agreed
23 that is the fact.
24 MR. PATRICK: And, Your Honor, the
25 next exhibit that we would be offering is
5717
1 Exhibit No. 68, which is a list of the
2 medical expenses for Mildred Wiley, and
3 Mr. Ohlemeyer has indicated to me that he
4 has no objection.
5 THE COURT: No objection to 68,
6 Counselor?
7 MR. OHLEMEYER: No objection, Your
8 Honor.
9 THE COURT: 68 will be admitted.
10 (Plaintiffs' Exhibit(s) 68 received in
11 evidence.)
12 MR. PATRICK: Your Honor, may I at
13 this time publish the total of the medical
14 expenses?
15 THE COURT: Go ahead, Counselor.
16 MR. PATRICK: The total of the
17 medical expenses incurred on behalf of
18 Mildred Wiley was \$42,702.
19 Your Honor, an additional fact for the
20 stipulation concerning Mr. Panzer, that Fred
21 Panzer was also assistant vice president for
22 public relations for the Tobacco Institute
23 in 1972.
24 THE COURT: '72?
25 MR. PATRICK: '72.
5718
1 THE COURT: All right.
2 MR. PATRICK: And I believe
3 Mr. Cross has some matters to publish.
4 THE COURT: All right. Mr. Cross.
5 MR. CROSS: Thank you, Your Honor.
6 At this time, Your Honor, I would ask
7 the Court to take judicial notice of Mildred
8 Wiley's life expectancy through a standard
9 life table, and I have marked for
10 identification 69? Is that the next number?
11 I have marked a copy of the standard life
12 table 69. May I show you?
13 THE COURT: Bring it up.
14 MR. CROSS: And pursuant to Rule of
15 Evidence 201 we would like the Court to take
16 judicial notice of this life mortality table
17 and that the -- and what her expected
18 life -- what her life expectancy was at the
19 date of her death.
20 THE COURT: Mr. Ohlemeyer, have you
21 had a chance to review this?
22 MR. OHLEMEYER: Yes, I have, Your
23 Honor.
24 THE COURT: Any objection?
25 MR. OHLEMEYER: No.

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1 THE COURT: Court will take
2 judicial notice of the mortality tables.
3 Mrs. Wiley was 56 years at the time of her
4 death. Her life expectancy was 26 years.
5 MR. CROSS: That's all the matters
6 I have, Your Honor. There is one other item
7 I think we will have in just a minute.
8 THE COURT: Ladies and gentlemen,
9 when the Court takes judicial notice of a
10 matter, what that means is that the fact
11 that the Court takes judicial notice of in
12 this instance is considered to be conclusive
13 and that any fact judicially noticed you
14 must accept as proven.
15 Mr. Cross, anything else?
16 MR. CROSS: Not from me, Your
17 Honor.
18 THE COURT: Any other exhibits to
19 offer at this time, Mr. Patrick or
20 Mr. Motley?
21 MR. MOTLEY: We have the matters --
22 THE COURT: I understand.
23 MR. MOTLEY: Other than that, I
24 don't think so.
25 MR. PATRICK: I think there is the
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1 matter of a funeral bill that is being
2 obtained now but I think we can do that in
3 the morning, if necessary.
4 THE COURT: Is that it?
5 MR. PATRICK: Your Honor, at this
6 time we would offer as the next exhibit the
7 funeral bill from Needham Storey Funeral
8 Service for the burial expenses of Mildred
9 Wiley dated -- the date of the bill is June
10 27, 1991, for her death on June 24, 1991.
11 THE COURT: This would be Exhibit
12 70. Any objection, Mr. Ohlemeyer?
13 MR. OHLEMEYER: No objection, Your
14 Honor.
15 THE COURT: 70 will be admitted.
16 (Plaintiffs' Exhibit(s) 70 received in
17 evidence.)
18 THE COURT: You can state the total
19 to the jury.
20 MR. PATRICK: And the total funeral
21 charges was in the amount of \$4,255.
22 I'm sorry. I misstated it. The grand
23 total, I'm sorry, was \$5,145.85.
24 THE COURT: Say that again for the
25 record.
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1 MR. PATRICK: \$5,145.85.
2 THE COURT: Thank you.
3 MR. PATRICK: Thank you.
4 THE COURT: Any other exhibits at
5 this time, Mr. Patrick?
6 MR. PATRICK: Mr. Motley, I think,
7 has some exhibits.
8 MR. MOTLEY: He knows that.
9 MR. PATRICK: No, no exhibits at
10 this time, Your Honor.
11 THE COURT: Now, if I understand

12 there perhaps will be some additional
13 documentary evidence in the morning.
14 MR. MOTLEY: Yes, Your Honor.
15 THE COURT: There will be no more
16 live witnesses for the plaintiffs and no
17 more depositions.
18 MR. MOTLEY: That's correct, we
19 rest subject to whatever documents Your
20 Honor allows in and we choose to publish in
21 the morning.
22 THE COURT: Ladies and gentlemen,
23 where we are at this point, there are some
24 matters that I need to take up with the
25 attorneys out of your presence.

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1 What I just asked the lawyers, we are
2 done with live witnesses for the plaintiff,
3 we're done with deposition testimony.
4 Tomorrow morning there may or may not be
5 some additional documents for you to review.
6 After that is done, my thought is the
7 plaintiffs will probably rest at that point
8 and the defense will take over at that point
9 and begin presenting witnesses tomorrow,
10 sometime probably mid-morning.
11 I realize that one of you has an
12 appointment tomorrow afternoon at 5:30, so
13 is 4:45 all right? All right, we'll break
14 at 4:45, Counsel, tomorrow. I tell you that
15 for planning purposes.
16 Again, now, the case is not concluded
17 so don't start talking about it among
18 yourselves or with anyone else.
19 (Standard admonition)
20 I'll see you tomorrow morning at 8:30
21 a.m. Good evening.
22 MR. CASSELL: All rise.
23 (Jury not present)
24 THE COURT: Be seated. All right.
25 Jury is not present.

5723

1 The Court, first of all, issue that
2 I've dealt with for several days, memorandum
3 have been filed. The issue of whether or
4 not documents of British American Tobacco
5 Company, Limited, BATCO, should be admitted
6 against BAT Industries and Brown &
7 Williamson. The Court has reviewed the
8 memorandum of Counsel. The Court is also
9 aware of the evidence submitted in the trial
10 to date.
11 In the Court's opinion, for evidentiary
12 purposes the corporate distinction between
13 BATCO and BAT Industries is of no
14 consequence. For evidentiary purposes
15 there, in fact, is not a distinction. The
16 documents of British American Tobacco
17 Company, Limited, if admissible generally,
18 should be admitted against BAT Industries
19 and Brown & Williamson. That's the Court's
20 order on that matter.
21 Plaintiffs filed a motion last evening
22 which I think the defendants received a

23 copy. Mr. Ohlemeyer, plaintiffs' request
24 for additional evidentiary and documentary
25 rulings. There was a request for a ruling
5724
1 on the conspiracy evidence to date, a ruling
2 on parent company issues, as well as certain
3 fundamental rulings on matters necessary to
4 close the case.
5 Mr. Motley, it's your motion.
6 MR. MOTLEY: Can I have one moment?
7 THE COURT: Certainly.
8 MR. MOTLEY: Your Honor, we have a
9 number of documents that we have listed.
10 You're referring now to the late night brief
11 we filed?
12 THE COURT: Yes.
13 MR. MOTLEY: I want to make sure
14 we're talking about the same thing.
15 You know the one we're talking about?
16 MR. OHLEMEYER: Correct.
17 MR. MOTLEY: Your Honor, we believe
18 that we have demonstrated a sufficiency of
19 core evidence to date to allow in, on
20 conspiracy issues, that is, that there was a
21 joining together, a furtherance of a plan
22 which the defendants tacitly or explicitly,
23 in this case I think the evidence is
24 compelling that they explicitly joined
25 together. Your Honor has allowed in the

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1 preplanning memo, 1953, Mr. John Hill's
2 memo, which we've read to the jury, which
3 demonstrates that they came together, all
4 but Liggett, with a common plan, a common
5 scheme; that their common plan and common
6 scheme was to reassure and to quiet the
7 instinctive fears of man -- I'm paraphrasing
8 now; hire the Hill & Knowlton public
9 relations firm, create the Tobacco Industry
10 Research Committee which evolved in 1958,
11 split, subsequently changing its name to the
12 Tobacco Institute and the Council for
13 Tobacco Research.

14 They've used such terms as we linked
15 arms, we joined together, we acted in a
16 concert of action, and we've given Your
17 Honor some citations to some of the
18 documents that we seek to admit.

19 Let's rally around it, let's march out
20 behind it, it's unity, it's better to speak
21 as an industry with one voice on such
22 matters.

23 When we refer to such matters, we're
24 referring here, Your Honor, to smoking and
25 health issues.

5726

1 We should speak with one voice.
2 That's -- that is a recurring message from
3 all of these documents. The documents I'm
4 referring to, some of them are documents of
5 individual defendants, some of them are
6 documents of the Tobacco Institute, and some
7 of them deal with mainstream smoke and

8 disease and smokers, some of them deal with
9 environmental tobacco smoke and the effect
10 of sidestream and environmental tobacco
11 smoke or secondhand smoke issues.

12 We believe, Your Honor, under -- that
13 the documents, if we've established a
14 conspiracy, with sufficient evidence of a
15 conspiracy, that the rules of evidence of
16 State of Indiana are clear.

17 In 801(D), No. 14, in the Miller, Judge
18 Miller's manual, he addresses at length the
19 statement of a parties co-conspirator. It's
20 textbook law, Your Honor. This is the law
21 in the federal courts. It's identical to
22 your rule here. "A statement is not hearsay
23 if the declarant was a co-conspirator of the
24 party against whom the statement was offered
25 and the statement was made during the course

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1 and in furtherance of the conspiracy. The
2 conspirators need not be jointly charged."
3 Well, here they are. "None need be charged
4 with conspiracy." Well, here they are.
5 "The admissibility of a co-conspirator's
6 statement does not depend on the timing of
7 the parties joined in the conspiracy.
8 Statements made before the defendant joined
9 the conspiracy may be admitted."

10 Now that's important, Your Honor, only
11 to Liggett. Liggett joined the Tobacco
12 Institute at a later point in time and they
13 joined the Council for Tobacco Research only
14 for a four-year period of time. And until
15 Mr. LeBow's public statement in 1995, or
16 1996, they had not publicly renounced the
17 conspiracy. Therefore, they should be --
18 the documents should be admitted against all
19 of the manufacturing defendants.

20 Now, we have briefed the issue, Your
21 Honor, about whether they should also run to
22 the parent corporations. And I didn't know
23 whether you wanted to hear us discuss that
24 legal contention or not.

25 THE COURT: Please. Go ahead.

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1 MR. MOTLEY: Well, Your Honor, I'm
2 here as a fact lawyer, an evidence rule
3 lawyer. I have to find myself a lawyer
4 lawyer back here who can talk about the
5 parent corporations and I see everybody
6 ducking under the table.

7 THE COURT: Do I get to pick one?

8 MR. MOTLEY: I think you ought to
9 pick one, Your Honor, that's qualified on
10 its face and I'm afraid I don't see one.

11 I can argue this, Your Honor, if you
12 like. Mr. Westbrook was going to argue it
13 and I thought he would be here. He briefed
14 it.

15 THE COURT: Let me see if I
16 understand, if I can put it in context.

17 Your first request is that documents
18 that have been entered on a limited basis

19 against one defendant or two defendants now
20 be offered as against all defendants. And
21 that's based on the foundation that you
22 think you've shown.

23 MR. MOTLEY: Yes. And if they're
24 in furtherance of the conspiracy.

25 THE COURT: Right.

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1 MR. MOTLEY: There may be -- there
2 are some documents, in fact, that, by their
3 own definition, the terms of them, where
4 Philip Morris may be discussing RJ Reynolds
5 and saying, oh, my, look what they're doing,
6 how do we catch up with them and things like
7 that.

8 There are some documents that I think,
9 on the face of them, probably would only be
10 admissible against one defendant, not all of
11 them. But in the main, in the main, all the
12 documents that talk about cooperation, all
13 the documents that talk about the Tobacco
14 Institute, all the documents which discuss a
15 common front, a party line, all the
16 documents which relate to the Council for
17 Tobacco Research, whether they shared their
18 own inner thoughts with the others or not,
19 we believe, Your Honor, are in furtherance
20 of the conspiracy and should be admitted.

21 THE COURT: Now, I'm assuming that
22 those were all included in your Attachment A
23 to your --

24 MR. MOTLEY: Yes, sir, they are. I
25 think we've delineated those and, obviously,

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1 if they're not listed, then we don't seek
2 their introduction beyond the ambit of
3 admissibility that we sought at the time we
4 proffered the document.

5 Judge, I don't want to make you wait,
6 or even ask you to wait, or suggest you wait
7 on Mr. Westbrook. I think I can --

8 THE COURT: And secondly, you're
9 asking that those also apply to all the
10 parent companies, the holding companies.

11 MR. MOTLEY: Yes, Your Honor. We
12 say that the underlying -- for example, if
13 we offered something against RJRT, we think,
14 based on the law that we've provided Your
15 Honor and the control that these documents
16 demonstrate, that they should also be
17 introduced against RJRN, the parent
18 corporation.

19 Ditto with -- for the same reasons that
20 Your Honor, apparently, was persuaded -- or
21 maybe not the same reasons, same logical
22 approach as Your Honor just announced your
23 ruling with respect to BATCO and BAT Holding
24 Industries, or whatever they call
25 themselves, as I call them Big BAT.

5731

1 Your Honor, if you would like, I'll go
2 into examples of active direction and
3 control of the cigarette industry by -- and

4 I'll step back away from BAT Industries
5 unless you want me to address that. I think
6 we've briefed that at great length.

7 THE COURT: You have.

8 MR. MOTLEY: Your Honor, we ask on
9 RJR Nabisco, Mr. Goldstone, the CEO of RJR
10 Nabisco testified with respect to his
11 ability to direct tobacco policies. "Would
12 it be your goal as chief executive of
13 Reynolds to try to market, to develop and
14 market a product that will not be the cause
15 of serious ailments?" He said, "That would
16 be definitely a goal of this company to do
17 that. And at this time, this industry will
18 work hand in hand with the government and
19 will work cooperatively in terms of medical
20 research." Then he goes on to talk about
21 they're not going to deny basic medical
22 truths.

23 "Has Reynolds under your stewardship
24 adopted a position of warning people in
25 Third World Countries about cigarettes and
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1 their potential hazards?" He says,
2 "Reynolds, as I understand it, has a policy
3 of putting warnings, different warnings are
4 required in different countries, and we have
5 warnings as they are required in each
6 country."

7 But then he says he's going to direct
8 the operating companies to put warnings on
9 cigarettes in Third World Countries even
10 when the countries don't require.

11 Your Honor, we've cited in our brief
12 additional examples of how RJRN was involved
13 in tobacco policy matters, particularly the
14 memorandum from Charles Mike Harper, RJR
15 Nabisco -- to Harper from Wright of RJR
16 Nabisco.

17 "The International Tobacco Company will
18 be responsible for growing RJR Nabisco's
19 overall tobacco business on a worldwide
20 basis."

21 This is Ness Motley Exhibit 26431,
22 which we quote from in the brief.

23 "The company will aggressively build
24 businesses in newly opened global markets,
25 increase share in established markets, and
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1 grow profits and cash flow significantly
2 over time as these businesses become more
3 established."

4 Judge, we think we've got sufficient
5 evidence from the documents that we cite
6 that we want to enter into evidence in this
7 case.

8 And without belaboring this, I know
9 you've read every piece of paper we've given
10 you, and I know you didn't get this till
11 late last night, but I think we've done a
12 fairly adequate job here of delineating for
13 Your Honor those documents which we
14 demonstrate show an indicia of control

15 sufficient to allow us to present to the
16 jury this case against the parent
17 corporations.
18 A separate theory here would be
19 conspiracy, Your Honor. We believe that
20 the -- even if the evidence doesn't amount
21 to such as would show sufficient control to
22 make them independently liable, we believe
23 the evidence is sufficient to demonstrate
24 that degree of control which would make them
25 co-conspirators in the overall scheme that

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1 relates to the Tobacco Institute, the
2 Council for Tobacco Research, and the
3 unified activities in concert of action such
4 that the -- and we've briefed this too, Your
5 Honor.

6 This was a subject of motion practice
7 long before we met the jury. And we
8 submitted Your Honor a brief and I would
9 incorporate the brief at that time and the
10 proffer of conspiracy documents, many of
11 which reappear in the paper before you. So
12 we believe they're independently liable from
13 the standpoint of control.

14 Let me say one thing for the record,
15 though. Your Honor, there's an issue of
16 timeliness here of dealing with Philip
17 Morris Companies, so we withdraw and would
18 not contest Philip Morris Company's motion
19 for directed verdict because of the statute
20 of limitations issue.

21 Isn't that what we --

22 MR. RILEY: Yes.

23 MR. MOTLEY: Because of the statute
24 of limitations issue. So we cleave out from
25 our proffer of last night that because I

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1 learned that we did have a serious statute
2 of limitations problem with respect to
3 Philip Morris.

4 What was the third issue that we were
5 to address, Your Honor?

6 THE COURT: You also indicated you
7 had some additional evidence on the Tobacco
8 Institute, Council for Tobacco Research
9 membership, the net worth of the companies.

10 MR. MOTLEY: Yes, Your Honor. I
11 don't know what we did with the net worth
12 issue.

13 What did you all decide to do? On net
14 worth, guys.

15 I wasn't involved in these discussions,
16 Your Honor.

17 As far as the CTR and the Tobacco
18 Institute, Your Honor, yes, we have
19 additional liability documents which we
20 believe demonstrate that the CTR and the
21 Tobacco Institute were complicit in the
22 overall conspiracy and ought to be liable as
23 co-conspirators.

24 THE COURT: Mr. Patrick.

25 MR. PATRICK: Your Honor, as part

1 of our exhibits that we would intend to
2 offer would be the annual reports of each of
3 the companies which would demonstrate their
4 net worth. In lieu of offering the annual
5 report, perhaps Mr. Ohlemeyer and I could
6 reach a stipulation as to the net worth of
7 each of the companies that remain in the
8 case.

9 Additionally, we have reports from the
10 Federal Trade Commission that concern the
11 amount of cigarettes sold and revenue
12 produced and the -- in particular a document
13 which Mr. Young provided concerning domestic
14 cigarette sales in 1996.

15 Your Honor, we would just rely on the
16 annual reports of the various companies
17 regarding their net worth.

18 THE COURT: You also indicated in
19 your memorandum, Mr. Patrick, that there
20 would be documents regarding strict
21 liability and product defect. What did you
22 have in mind?

23 MR. PATRICK: I think I would have
24 to defer to Mr. Motley on that point.

25 I'm sorry, Your Honor. I know that

1 there are documents that we have already put
2 into evidence which deal with the issue of
3 the fact that a safer cigarette could be
4 produced which would go to certain
5 state-of-the-art issues, as well as
6 defectiveness of the product because the
7 product could have been made safer.

8 THE COURT: So there are no
9 additional documents?

10 MR. PATRICK: Your Honor, there are
11 additional documents that would be offered.
12 Those were detailed in the memorandum that
13 we offered last night and I would simply
14 have to defer to Mr. Motley. They are
15 individual documents.

16 MR. MOTLEY: Judge, we're prepared
17 to go through them one at a time, however
18 you like.

19 THE COURT: We just don't want any
20 surprises here. Are you aware of all the
21 documents to which they refer?

22 MR. OHLEMEYER: I think so, Your
23 Honor. If I may just briefly, I'm not sure
24 what it is we're doing here.

25 THE COURT: I have many days like

1 that.

2 MR. OHLEMEYER: Well, here is why I
3 ask. The request for additional evidentiary
4 document rulings was described to Your Honor
5 almost as if it were a response to a Trial
6 Rule 50 motion that we've yet to file.
7 Obviously, we intend to file one. And at
8 that point it may be appropriate to consider
9 many of these issues. I'm going to let
10 Mr. Shockley deal with that specifically.

11 But yes, we've gotten this document.
12 There are a number of documents in this
13 proffer that aren't on the exhibit list or
14 aren't in evidence at this point.

15 THE COURT: That's what I
16 understood. And I shared your confusion,
17 Counselor. I think, my understanding was we
18 were going to discuss whether or not the
19 documents already in evidence should apply
20 to all, basically all other defendants on
21 the conspiracy theory.

22 MR. OHLEMEYER: That's one issue.
23 Another issue is they have some additional
24 documents they want to admit into evidence.

25 THE COURT: Right.

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1 MR. OHLEMEYER: That's another
2 issue.

3 With respect to the net worth, if I
4 would be presumptuous, Your Honor, to say
5 that what I think ought to happen, what I've
6 seen happen in the cases like this before,
7 is there comes a point in time where the
8 plaintiffs say we've put all the evidence on
9 we're going to put on this issue and the
10 Court has to decide clear and convincing
11 such that it should go forward.

12 If what we are going to do this
13 afternoon is assemble the remaining
14 plaintiffs' proof and Your Honor is going to
15 pass on it, then, presumably, the plaintiffs
16 would rest, presumably we could file our
17 Rule 50 motion, and then if overnight Your
18 Honor decides that there is sufficient
19 evidence for them to proceed on the punitive
20 damage claim, we can reach a stipulation as
21 to net worth as opposed to dealing with that
22 as a matter of evidence.

23 But I think it seems to me that what we
24 need to do is to figure out what it is we
25 need to do for the plaintiffs to conclude

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1 their case. It seems to me that we're kind
2 of backwards. We're talking about something
3 essentially that responds to a motion we
4 haven't filed yet. We'd like to file it and
5 we're ready to file it.

6 THE COURT: First issue, and let me
7 hear your thoughts on this. The request is
8 that the evidence already admitted apply to
9 all defendants based on the conspiracy
10 theory.

11 MR. OHLEMEYER: And Mr. Shockley
12 will speak to that.

13 THE COURT: Mr. Shockley.

14 MR. SHOCKLEY: Thank you, Your
15 Honor. I'm just as confused as everybody
16 else, maybe more so.

17 It would seem to me -- well, here is
18 the problem if we go ahead and spend the
19 time now, and I assure the Court it will be
20 a substantial amount of time, because as to
21 just the 30 or so documents that they've

22 identified in that pleading they filed
23 today, we're prepared to go through those on
24 a document-by-document basis and identify
25 the arguments to the Court that we think

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1 make many, if not all of those documents,
2 not 801(D)(2)(E) documents that are
3 admissible as co-conspirator statements
4 against other members of this alleged
5 conspiracy.

6 But here is the procedural problem as I
7 see it. And that might just be as to this
8 potential conspiracy that they allege about
9 or between manufacturing defendants.

10 There are holding company defendants
11 against whom or with respect to whom the
12 evidence may be and I submit is quite
13 different.

14 I have a separate argument on the
15 conspiracy allegation as it pertains to my
16 specific holding company defendant, and I
17 think I speak for some of the other counsel
18 for those holding company defendants who
19 will want to probably address their own
20 remarks to the Court with respect to that.

21 We're going to be here a long time
22 asking the Court, or trying to assist the
23 Court in making a determination on what is,
24 I suggest, based on what we've heard and
25 what we were given last night, an incomplete

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1 record.

2 And what may well happen is the Court,
3 for instance, may decide the conspiracy
4 hasn't been established or it hasn't been
5 established as to this defendant or that
6 defendant and then we go through the hoops
7 all again tomorrow to produce evidence and
8 we end up arguing it all over again.

9 I suggest to the Court, respectfully,
10 that a procedure that would save us a lot of
11 time would be to let the plaintiffs go ahead
12 and finish their proof with respect to
13 whatever it is among these documents that
14 they identified in last night's pleading, or
15 for that matter I suppose other things they
16 may have designated previously, complete
17 their proof, and then we can argue all of
18 these issues at one time.

19 I only have to make one argument, then,
20 to the Court, for example, on behalf of
21 American Brands. They haven't proven a
22 conspiracy or they haven't proven -- they
23 haven't pierced the corporate veil or they
24 haven't done this or they haven't done that.
25 I can make just one argument at that time

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1 with respect to conspiracy as it pertains to
2 manufacturing defendants. The rest of my
3 colleagues can make their separate arguments
4 as they pertain to the way we think we will
5 approach a Rule 50 motion when the time
6 comes.

7 But we're going to spend a substantial
8 amount of time here, and I'm not sure we
9 really will have accomplished anything
10 because we're arguing to the Court on the
11 basis of an incomplete record.

12 By my count, Your Honor, rough as it
13 is, because I know that sometimes documents
14 are identified more than once and I tried to
15 allow for that when I went through this
16 pleading that Mr. Motley filed last night,
17 there is as many as perhaps 170 new
18 documents here that are not in the record in
19 this case thus far. I think we need to deal
20 with those.

21 And I don't think it's appropriate to
22 argue to the Court and make reference to
23 these documents until they're in the record
24 and argue, for instance, that somehow those
25 are proof of or evidence of, for example,

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1 conspiracy. And we heard just such an
2 argument here a minute ago.

3 We need to deal with these, we need to
4 know whether or not these were admissible,
5 we need to know whether or not these can be
6 authenticated, what the record is, and
7 completed on behalf of the plaintiffs and
8 then we can argue all these motions,
9 substantial as they are, at one time.

10 And I would ask the Court for guidance
11 on that approach before I speak to anything
12 substantively.

13 THE COURT: Plaintiff, first of
14 all, do you have an objection if we hold in
15 abeyance the instructions to the jury on the
16 evidence that has already been admitted?

17 MR. MOTLEY: No, Your Honor, not at
18 all. In other words, you're asking me is it
19 okay if we defer for a time --

20 THE COURT: Right.

21 MR. MOTLEY: -- the first part of
22 our argument that the limiting instruction
23 should be lifted as --

24 THE COURT: Right.

25 MR. MOTLEY: No objection to that

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1 whatsoever.

2 THE COURT: I think that's a good
3 idea also, Mr. Shockley. We'll just do
4 that.

5 The second part of the argument, and as
6 Mr. Shockley points out, Mr. Motley, there
7 were well over 100 new documents that were
8 referenced in your memorandum last evening.
9 I'm assuming not all of those will be
10 offered.

11 MR. MOTLEY: Your Honor, we intend,
12 with the exception of the documents that
13 were not on our exhibit list, and there are
14 some of those, and we can identify those, we
15 move, to the extent that any of this
16 involves 104 determinations, the fact that
17 they weren't on our exhibit list, we don't

18 believe a preliminary finding of fact, for
19 example, to support holding company -- the
20 predicate that the holding companies were
21 involved in a conspiracy, under Rule 104, we
22 think Your Honor can consider those on legal
23 issues without submitting them to the jury.
24 With respect to documents that aren't
25 on our exhibit list that don't deal with a

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1 104 issue, we understand Your Honor has
2 ruled that only in a rare exception will
3 Your Honor relieve us of the burden of
4 having not listed them notwithstanding the
5 fact they just came into our possession
6 after the date that we were required to list
7 them. And we will meet the issue of whether
8 we had to list them in our rebuttal or our
9 cross-examination case when that arises.

10 So there are some documents on there
11 that are not 104 documents, but there are
12 very few. Most of the documents that we
13 listed last night were listed, either listed
14 on our exhibit list or we believe they go to
15 a 104 issue and didn't have to be listed.
16 Your Honor can consider whether they were
17 listed or not.

18 There are some documents of the 170, or
19 however many there are -- I didn't count
20 them -- that, in fact, based on Your Honor's
21 prior ruling, we can't offer them in our
22 case in chief either as a 104 to the Court's
23 submission or to the jury.

24 Whatever that subcohort of documents
25 is, we do move them into evidence. We're
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1 not going to read them all to the jury. We
2 may pick out 10 or 15 in the morning of the
3 ones that Your Honor feels that were listed
4 and are relevant on whatever issue and are
5 not offered to Your Honor just under 104,
6 but are offered for the jury and for the
7 record for Your Honor to consider on
8 directed verdict, and I can give Your Honor
9 those -- the documents that I so identified.
10 We have them identified as to whether or not
11 they were, in fact, on our exhibit list. I
12 can readily do that.

13 THE COURT: All right. Why don't
14 you do that.

15 MR. MOTLEY: Okay.

16 MR. OHLEMEYER: I think what I'm
17 hearing, Your Honor, is that at some point
18 soon we're going to get a list of exhibits
19 and they're going to say I move this into
20 evidence.

21 THE COURT: No. I think he's going
22 to tell me right now how many he's going to
23 move into evidence, and he indicated 10 or
24 15.

25 MR. MOTLEY: I hope I'm clear that
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1 there is a cohort of documents that we're
2 moving into evidence, and among that cohort

3 be it 150 or 160, whatever it is, are 10 or
4 15 that we will pick from the record and
5 publish in the morning before he starts his
6 evidence. I believe I told Bill that a
7 little earlier with the Court's permission.
8 In other words, we don't seek to
9 publish 170 documents to the jury. Just as
10 with Huber, we introduced documents that we
11 did not publish to the jury. We just put
12 them in the record for Your Honor's
13 consideration for my use in closing argument
14 for the jury's consideration.
15 MR. WAGNER: Judge, excuse me, I
16 don't mean to interrupt, but I don't get it.
17 I don't get it, how you can mark a document
18 for identification, argue it to the jury,
19 and not have it admitted into evidence.
20 MR. MOTLEY: I didn't say mark it
21 for identification.
22 THE COURT: I don't give anything
23 to the jury, unless it's admitted.
24 MR. WAGNER: That would be my
25 understanding.

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1 MR. MOTLEY: I didn't say marked
2 for identification. I said move them into
3 evidence like I did some of the Huber
4 documents. I moved into evidence some of
5 the Huber documents. Most of them that I
6 moved in, you allowed in. Some you
7 sustained. Others I moved only to ID.
8 There's three different groups of Huber
9 documents. The ones that I moved into
10 evidence that Your Honor accepted, I didn't
11 publish any of those.
12 THE COURT: I agree.
13 MR. MOTLEY: Okay. If there is 150
14 such that I move into evidence that Your
15 Honor allows into evidence, those are not
16 marked for ID. They're just like Huber
17 documents that are in evidence.
18 THE COURT: I agree.
19 MR. WAGNER: Okay.
20 MR. MOTLEY: All right. Now, my
21 understanding is, Judge -- and I'm having my
22 folks look -- the only document that we
23 believe that was not listed on the Wiley
24 list that's in that group that we gave you
25 last night is 1465601 -- it's like a term of

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1 pregnancy, the list continues to swell
2 here -- and 3385 was also not listed. We
3 believe the rest of them were, in fact,
4 listed, Your Honor.
5 So now we move, and I would ask Your
6 Honor to consider those two, but I
7 understand that you don't want to rehash
8 that right now, but we move all but those
9 two into evidence, not for ID, but into
10 evidence into the record in this case.
11 MR. SHOCKLEY: Judge, unless I'm
12 missing something, you just can't do it that
13 way, and I don't know how more simply and

14 plainly to say it.
15 THE COURT: Now, these documents
16 are not marked; is that right, Mr. Motley?
17 MR. MOTLEY: They are not marked,
18 but we have -- we have the stickers here.
19 They are premarked, she said.
20 MR. SHOCKLEY: I don't mean to be a
21 drudge, but when you do document-sensitive
22 paper cases, it's drudgery, and we need, I
23 would submit, to go through these documents,
24 if they're going to be offered for admission
25 by the plaintiffs.

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1 THE COURT: You do indeed,
2 Counselor, and they have been offered, but I
3 don't even know what's offered, because I
4 don't know what the exhibits are and you
5 don't either.
6 MR. WAGNER: We don't have a clue,
7 except these snippets of information, of
8 course.
9 MR. MOTLEY: We produced all these
10 documents. We gave them exhibit numbers, we
11 gave them snippets so Your Honor would
12 understand and they would understand what we
13 claimed was partial relevance. We got
14 copies here for everybody. They've had
15 these documents for six months so for him to
16 say he doesn't know what the document says
17 is --

18 THE COURT: They're going to have
19 this evening to look at these documents
20 before I even consider them. We'll do that
21 this evening. You can do that this evening.
22 MR. OHLEMEYER: I was going to say,
23 part of this isn't a -- it's not -- part of
24 it is a timing issue. Part of it is
25 physically having the exhibit.

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1 THE COURT: I understand.
2 MR. OHLEMEYER: If we had some of
3 the exhibits here, we might be able to plow
4 through some of it tonight.
5 MR. MOTLEY: We're going to give
6 them a copy right now.
7 THE COURT: All right. What we've
8 done then this afternoon so far, we've
9 agreed to hold the issue of the limiting
10 instruction for the documents that are
11 already in evidence. We're going to hold
12 that in abeyance until we have a little more
13 time to deal with that on Mr. Shockley's
14 suggestion which is wise.
15 You will offer more documents tomorrow
16 morning, and I've directed that defense
17 counsel have an opportunity to examine each
18 and every one of those documents this
19 evening and make any objections they might
20 like in the morning or when we have an
21 appropriate time here. But I don't know how
22 else to do it other than in the morning.
23 MR. WAGNER: Could we also be told
24 which ones they intend to publish to the

25 jury?

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1 THE COURT: That would be fair.

2 MR. MOTLEY: I wouldn't know that
3 until Your Honor rules which ones are in or
4 out.

5 THE COURT: You told me you only
6 had a few you were going to publish, so you
7 can tell them tonight what you're going to
8 publish.

9 MR. MOTLEY: Okay. Judge, here is
10 what I'm going to do. I'll give them the 25
11 most likely candidates because I'm only
12 going to publish 10 or 15, but I don't know
13 which ones you are going to let in.

14 THE COURT: On the 1465601 and the
15 3385, those were documents that were omitted
16 from your exhibit list, and they are not
17 offered.

18 MR. MOTLEY: Judge, if there is
19 another one in the group that wasn't on the
20 exhibit list, we'll let the defendants know
21 tonight, but that's our first run at it. We
22 think that's accurate. And the same ruling
23 would apply. We'll withdraw that from the
24 cohorts.

25 THE COURT: This is going to take a
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1 little time in the morning. I got this jury
2 coming in at 8:30. Could we deal with this
3 in an hour, half hour, what do you think?

4 MR. SHOCKLEY: 150 documents.

5 MR. WAGNER: 150 documents. I
6 don't see how.

7 MR. MOTLEY: Judge, I think we can
8 assume the relevancy is fairly easy.

9 THE COURT: There may not be any
10 objection.

11 MR. OHLEMEYER: I think we can put
12 them into groups. Some of them are going to
13 require, depending on who they are offered
14 against, going to require individual
15 scrutiny. Others I think you can lump
16 together and fairly be guided by how you've
17 treated those issues previously.

18 But the whole problem -- this wouldn't
19 be very hard, Your Honor, even at 4:15, if
20 we just stack them all up and saw what it is
21 we're looking at. And if I had
22 understood -- I mean, I didn't understand
23 that what they wanted us to do was to
24 assemble, which we could have, assemble each
25 document identified in that pleading last

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1 night. But --

2 THE COURT: That's not fair.

3 MR. OHLEMEYER: That's all I'm
4 asking. If we had a stack of the exhibits
5 right now.

6 MR. MOTLEY: We've got a stack
7 right now.

8 MR. OHLEMEYER: In 15 minutes, I
9 could tell you whether it's going to take

10 120 separate discussions or whether it's
11 five discussions that apply to ten documents
12 here, 15.

13 THE COURT: Why don't we take a
14 break for 15 or 20 minutes.

15 MR. MOTLEY: Your Honor, let me
16 suggest that the question about who all it's
17 offered against, we would do this just as if
18 we were doing it during the trial and just
19 offer it against a limited number subject to
20 your deferring the issue of whether they
21 come in on a more broader -- in other words,
22 a limiting instruction issue, we can defer
23 that for these also.

24 MR. SHOCKLEY: How do we know who a
25 particular document, which defendant or

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1 defendants it's going to be offered against
2 initially?

3 MR. MOTLEY: We'll do that.

4 THE COURT: Let's take about a
5 20-minute break.

6 MR. BYRON: Judge, I wanted to
7 raise one other question for CTR. There is
8 going to be directed motions at the close of
9 their case for directed verdict.

10 THE COURT: Right.

11 MR. BYRON: And there is going to
12 be a number of those. I know the holding
13 companies have their separate motions and we
14 and TI, I know, also have separate motions.
15 And they may be on different bases, and I
16 wondered if it's probably going to take a
17 couple hours or an hour or so to argue those
18 motions.

19 THE COURT: My thought was that
20 when the appropriate time comes, we would --
21 perhaps around noon, we'd send the jury out
22 for noon and have them come back at 2:30 or
23 whatever.

24 MR. BYRON: Okay.

25 THE COURT: All right. We'll break
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1 for 20 minutes.

2 (A brief recess was taken.)

3 MR. CASSELL: All rise.

4 THE COURT: You thought I was going
5 to go home, didn't you?

6 MR. MOTLEY: We have a proposal
7 that Mr. Ohlemeyer and I think we have
8 reached a meeting of the minds on that we
9 would like to propose to Your Honor to
10 consider.

11 THE COURT: I'm open for
12 suggestions.

13 MR. MOTLEY: As a way through this
14 seeming morass here. I am going to give
15 them a list of 30 numbers by 6:00 tonight
16 that I want to present to Your Honor for
17 argument. To the extent that there is any
18 argument, some of the arguments may be -- we
19 made the same argument just for the record
20 so we won't have to take each document one

21 by one in the morning.
22 THE COURT: All right.
23 MR. MOTLEY: From that subset of
24 30, I will publish no more than 15 or 20 to
25 the jury. Even if I want all 30, I still
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1 wouldn't publish more than 15 or 20, so we
2 don't have to argue 150 documents. We'll
3 argue 30, some of which we'll just repeat
4 the arguments that have been made because
5 some of them are of the same kind that Your
6 Honor has already addressed.
7 THE COURT: All right.
8 MR. MOTLEY: Then the rest of the
9 documents, Your Honor, we can have some
10 time -- I've been hooked before but never a
11 microphone in the back -- cluster them and
12 ease the Court's burden and the parties'
13 burden about having to argue.
14 I really only want them in the record
15 for legal purposes at this point to make
16 sure I've got clear and convincing evidence,
17 to make sure I've got conspiracy evidence.
18 Then the only other remaining group of
19 documents then would be the documents that
20 relate to the parent companies, and I
21 suggest that we deal with those on paper.
22 And if they want to argue, you know, maybe
23 tomorrow after court, I have no argument. I
24 know Your Honor is concerned about telling
25 the jury to be here at 8:30 and not spend
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1 three hours arguing documents. I know you
2 don't want that. We don't want it, and I
3 think this is a way to get us around that.
4 So that we economize your time and our time,
5 and we can put as much on paper as possible
6 so Your Honor does haven't to deal with a
7 bunch of prolonged lawyer arguments.
8 THE COURT: Mr. Ohlemeyer, what's
9 your thought?
10 MR. OHLEMEYER: Well, I think we
11 have three problems and two and a half
12 solutions. This is what I understand to be
13 the documents that relate to the holding
14 companies, the non-manufacturing companies.
15 And I can't speak for them, and one school
16 of thought would be that if they are here
17 and prepared on these documents this
18 evening, that they ought to go ahead and
19 make those arguments, get the record closed
20 as to them and then they can file whatever
21 motions they need to file tomorrow.
22 On the other hand, so long as there is
23 no waiver, there is no motion that
24 necessarily needs to be decided for the
25 non-manufacturing defendants at the close of
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1 the plaintiffs' case, as opposed to at some
2 point between the close of the plaintiffs'
3 case and the point at which they would have
4 to put on evidence or the point that the
5 case has to go to the jury.

6 But, again, that's something I really
7 can't -- I leave it to them to decide
8 whether it makes more sense to deal with
9 these tonight or send them to you in some
10 kind of written fashion with legal briefs on
11 it.

12 THE COURT: These are documents
13 just against the holding companies?

14 MR. MOTLEY: Yes, Your Honor. And
15 I would just suggest that given the hour and
16 we've got to start cross-examination in the
17 morning, that Your Honor has read every
18 piece of paper we've given you, and I just
19 think it would be preferable to just do
20 these parent documents. Because it may not
21 look like much to Mr. Ohlemeyer, but there
22 is about 75 documents in there and it's
23 5:00. I've got to cross-examine three
24 witnesses tomorrow, and I don't want to be
25 here until 9:00 tonight arguing one document

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1 after another when we can do it just as well
2 on paper.

3 MR. OHLEMEYER: If I may, Your
4 Honor, that was the one and let me get the
5 two and a half.

6 THE COURT: Go ahead.

7 MR. KOLB: Your Honor, if I may,
8 I'm Dan Kolb for RJR Nabisco Holdings. I
9 think it would take me less than five
10 minutes to give you the objections with
11 respect to the 11 documents that Mr. Motley
12 listed in their proffer of last night that
13 arguably pertain to my client. It would
14 just take me that long because it's just a
15 single set. I can give them numbers.

16 I've got basically two objections that
17 I would register, and I think we could get
18 it out of the way. My impression from the
19 other holding company lawyers is that they
20 could do something along the same lines. It
21 really wouldn't take very long.

22 THE COURT: I don't mind doing it
23 tonight if it's going to be that quick.

24 Mr. Ohlemeyer?

25 MR. OHLEMEYER: Second -- that's

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1 one issue. Issue No. 2 is this stack of
2 exhibits, which quite frankly, Your Honor,
3 it would take -- this is more -- this is
4 five times the amount of evidence that's
5 already been admitted. It would take us a
6 week to go through this; and I think, if I
7 understand what Mr. Motley is saying, is he
8 wants to tell us which of the 20 or 30 that
9 he intends to put into evidence tomorrow and
10 publish to the jury. He intends to give us
11 a list of those documents tonight. I think
12 he's suggesting that we come in before 8:30
13 to make a record on it and then be guided by
14 the Court's ruling. And that makes perfect
15 sense to me.

16 That's two. The half, the half problem

17 or the half solution is at some point,
18 though, the defendants need to make a trial
19 Rule 50 motion, and at some point the
20 plaintiffs' record has to close. And I
21 don't quite know how to do that in a way
22 that is efficient, that doesn't create two
23 days of nothing happening while the trial
24 goes on and allows the Court to deal with
25 whatever of this they intend to offer into

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1 evidence.

2 One thought is that we submit it all to
3 Your Honor with, you know, four lines of
4 objection and four lines of proffer document
5 by document and you decide it at your
6 leisure. Another thought is that we file --
7 that they rest, we file our motion, and that
8 anything from this stack they want to use in
9 response to our motion on the punitive
10 damage issue be considered as evidentiary
11 and then as substance in response to that
12 motion at that point.

13 That is an issue obviously that really
14 doesn't affect anything until the case goes
15 to the jury as it relates the punitive
16 damages. So that's kind of the half
17 solution.

18 I quite frankly, I don't know what to
19 do with all this. This is -- this is a
20 stack of stuff.

21 THE COURT: Well, we know the
22 documents that are offered against the
23 holding companies. There are issues that I
24 can't decide until the documents are either
25 in or not into evidence.

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1 All the holdings company agree with RJR
2 that we can argue these fairly briefly?

3 MR. MOTLEY: Your Honor, may I say
4 one thing before they answer? And that is,
5 I misspoke about Philip Morris Company. I
6 didn't realize that had already been subject
7 to summary judgment motion, and we had a
8 relation back argument. So what I said
9 about Philip Morris Companies, I will
10 withdraw. I was unauthorized to say that.
11 So we are making a case against them. I was
12 mistaken. I misunderstood the conversation
13 at lunch today.

14 I just say to you, Judge, with all due
15 respect to counsel's ability or his
16 reputation as being the soul of brevity, I
17 don't share the enthusiasm that all seven of
18 them or six of them can get up here and we
19 can do this in as brief a period of time. I
20 just think we can submit it on paper, and
21 Your Honor reads all that paper and make a
22 decision.

23 As far as Mr. Ohlemeyer's suggestion
24 about using that in response to punitive
25 damages, I'm glad to do it anyway so long as

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1 sometime before it goes to the jury when

2 these Rule 50 motions are decided, that
3 this, all of this that Your Honor is going
4 to allow into the record is in the record.
5 And I state that I am authorized to say
6 that without any fear of contradiction from
7 those behind me, that there will be no claim
8 by us of any waiver of anything by adopting
9 a procedure that gives everybody more time
10 and Your Honor more time to come up with a
11 way that doesn't take a lot of time, Court
12 judicial time and the jury waiting in the
13 back while we argue documents.

14 We're amenable to anything that is a
15 solution. Mr. Ohlemeyer's suggestion about
16 getting all that in the record is fine with
17 us, although we think our suggestion is
18 better, that we submit that to you on paper
19 and Your Honor make a decision when you
20 believe it's appropriate and then they can
21 make their Rule 50 motion then. We won't
22 claim they've waived anything about going
23 forward with witnesses tomorrow.

24 THE COURT: Well, what got this all
25 started were the two principal issues that

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1 we really haven't addressed other than
2 Mr. Shockley's suggestion of holding in
3 abeyance the issue as to whether or not
4 statements in documents apply to the parent
5 companies. I thought about that over the
6 break we had.

7 We also have the general issue that
8 Mr. Motley has requested in his motion as to
9 whether or not the documents that I have let
10 in on a limited basis, the jury -- whether
11 or not the jury be told that those now apply
12 to all defendants. Those are the documents
13 already in evidence. We have those two
14 issues.

15 Mr. Shockley, I'm not sure at this
16 point, after I reflected upon it, I'm not
17 sure that I want to hold that issue in
18 abeyance for a lot of reasons. I think the
19 wiser course at this point, and I'm going to
20 do this, I'm going to instruct the bailiff
21 and the court reporter to advise the jury to
22 be here tomorrow at 1:00 p.m. I'm going to
23 call them off for in the morning. We
24 haven't had to do this much during the trial
25 and unfortunately we're going to have to do

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1 this now. We're going to address those two
2 issues I mentioned.

3 We'll also address the documents that
4 Mr. Motley has offered against all
5 defendants. We'll address those in the
6 morning.

7 I understand there was a request to
8 proceed on the holding company, but I think
9 since I've done that, I'm going to deal with
10 the holding company issues tomorrow.

11 So the first thing I will decide, we'll
12 take up the issue of what evidence will be

13 admitted as to all the defendants, what
14 evidence will be admitted only as -- what
15 evidence will be admitted to the holding
16 companies. Then we'll deal with the general
17 issue as to the documents that are already
18 in evidence, whether they should be applied
19 and whether the jury should be instructed
20 that they are applied to all defendants, and
21 we'll also deal with the collateral issue
22 whether or not those documents, whether
23 there is enough evidence in this record to
24 apply the documents already in evidence in
25 terms of the conspiracy theory against the
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1 holding companies.

2 MR. BYRON: Judge, on behalf of
3 CTR, there is -- we have a concern about
4 proceeding that way, and that is simply
5 this: That our motion for directed verdict
6 strikes at the center question of whether or
7 not the conspiracy has been proven with
8 regard to CTR. And we'd like to address the
9 motion for directed verdict after the close
10 of this case and have the question on what
11 documents might be permitted against -- to
12 be evidence against all defendants,
13 including CTR decided after the directed
14 verdict motions are made.

15 THE COURT: I'm not going to do
16 that, Counselor. I'm going to decide it
17 before the plaintiff ends their case.

18 MR. BYRON: Okay.

19 THE COURT: I appreciate your
20 thought on that, but I think that's the
21 wisest course.

22 MR. BYRON: I understand.

23 MR. KOLB: Your Honor, can I ask,
24 are we following Mr. Motley's suggestion
25 that the question as to the admissibility of
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1 documents as to the holding companies is on
2 papers or can we do that in the morning?

3 THE COURT: No, I would just as
4 soon we did that by argument. Are you going
5 to be available tomorrow?

6 MR. KOLB: Yes. That would be our
7 preference if we could. Did you say you
8 were going to take that up after the
9 question of the documents being introduced
10 against all parties?

11 THE COURT: Yes. I did.

12 MR. KOLB: Thank you, Judge.

13 THE COURT: There was a request for
14 judicial notice, Mr. Cross.

15 MR. CROSS: Yes, Your Honor, we
16 have some of the documents, but I don't have
17 the actual order. That should be -- it was
18 supposed to be obtained from the clerk's
19 office yet this evening, but it has not got
20 back down to the Horizon Center. I should
21 have it first thing in the morning.

22 THE COURT: All right. Defendants
23 filed also a response to plaintiffs' motion

24 to exclude the study authored by Roger
25 Jenkins. Is the request from the plaintiffs
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1 a request for a hearing, Mr. Motley? A
2 Daubert hearing?
3 MR. MOTLEY: Yes, Your Honor. You
4 may have to take testimony from Dr. Jenkins
5 or there was testimony developed in his
6 deposition in the Broin case and there was
7 testimony developed by the Court at a
8 Daubert hearing.
9 THE COURT: I read that.
10 MR. MOTLEY: I don't know that --
11 THE COURT: But you are
12 requesting --
13 MR. MOTLEY: I can rest -- you
14 don't have the deposition record, though.
15 THE COURT: No, I don't.
16 MR. MOTLEY: So that's because we
17 didn't get the -- are not getting the
18 deposition until 9:00 tonight.
19 THE COURT: All right. Well --
20 MR. MOTLEY: He's their first
21 witness in the morning.
22 THE COURT: Show it as a request.
23 As I recall the last hearing we had in that
24 nature did not take very long. Ten, 15
25 minutes, I think.
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1 MR. WAGNER: That's because I was
2 brief, Your Honor.
3 THE COURT: I think that was the
4 case.
5 Anything else we need to talk about,
6 Mr. Ohlemeyer, Mr. Wagner?
7 MR. OHLEMEYER: What time do you
8 want us in the morning? We're early risers.
9 MR. MOTLEY: No, we're not. It
10 depends on what time we go to bed.
11 THE COURT: I am going to call the
12 jury off and I think 8:30 will be all right.
13 MR. MOTLEY: Judge, when we will
14 have the Daubert thing, in the morning also?
15 THE COURT: Is your witness
16 available, Mr. Ohlemeyer?
17 Mr. Furr?
18 MR. FURR: Yes, he is, Your Honor.
19 THE COURT: We'll have that in the
20 morning also.
21 MR. MOTLEY: That will following
22 everything else.
23 THE COURT: Yes, hopefully. All
24 right. Have a good evening.
25 (Proceedings were adjourned at 5:15
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1 p.m. to be reconvened March 4, 1998, at 8:30
2 a.m.)
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4

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